89-876

Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1989

MIRIAM BEN-SHALOM,

Petitioner,

v.

JOHN O. MARSH, JR., Secretary of the Army, VANCE COLEMAN, Commanding Officer, H.Q. 84th Division, U.S. Army Reserve, and JOHN ALLEN, Lt. Colonel, Commanding Officer, 5091st U.S. Army Reception,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether there is a rational basis to deny reenlistment in the military to an individual, admitted by the respondents to be an excellent soldier, solely because of her homosexual orientation, even though there is no evidence of any type of misconduct.

2. Whether military regulations, which mandate denial of reenlistment to those individuals who admit to homosexual orientation but have never been found to have committed a homosexual act, unreasonably chills freedom of speech.

3. Whether individuals of homosexual orientation are members of a group which is entitled to strict scrutiny under equal protection anaylsis.

4. Whether the respondents' decision to deny reenlistment to those of homosexual orientation, even though there is no

evidence of misconduct, should be granted broad discretion by the court.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Miriam Ben-Shalom, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on August 7, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 881 F.2d 454 (7th Cir. 1989). The opinion appears in the appendix at A-1.

The first two district court opinions (regarding respectively the preliminary injunction and contempt citation) are unreported. Those opinions appear in the appendix at pages A-93 and A-111 respectively.

The district court's decision on the merits is reported at 703 F. Supp. 1372 (E.D. Wis. 1989) and appears in the appendix at A-55.

JURSIDICTION

The judgment sought to be reviewed is dated August 7, 1989, and was entered that day. The petition for rehearing and

suggestion for rehearing en banc was denied October 11, 1989. This court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

I. First Amendment, U.S. Constitution (excerpt).

Congress shall make no law...abridging the freedom of speech...

II. Fifth Amendment, U.S. Constitution (excerpt).

No persons shall...be deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner, Miriam Ben-Shalom, is currently a member of the Army Reserves and is a Technical Sergeant with the 5091st Reception Batallion of the 84th Division (Training), whose headquarters is located in Milwaukee, Wisconsin. She is an admitted lesbian. Petitioner was previously discharged from service

because she made statements that she was a lesbian. In 1980 the District Court for the Eastern District of Wisconsin ordered her reinstated. Ben-Shalom v. Secretary of the Army, 489 F. Supp. 964 (E.D. Wis. 1980).

In that case, the Army did not appeal from the finding that its regulations regarding homosexuality were unconstitutional. However, the Army continued to refuse to reinstate her until ordered by a Seventh Circuit Court of Appeals decision in Ben-Shalom v. Secretary of the Army, 826 F.2d 722 (7th Cir. 1987). That order required the Army to reinstate the petitioner for the remaining eleven months and two weeks of her service contract.

Petitioner applied for reenlistment in the early spring of 1988, but was

barred from reenlisting by the respondents because she is in violation of Army Reserve Regulation AR 140-111, Table 4-2, which makes homosexuality a non-waivable disqualification to enlistment.

In the petitioner's statement to her commanding officers recommendation to bar her from reenlistment, petitioner acknowledged that she was an individual of homosexual orientation, but asked the respondents not to consider her sexual orientation a disqualifying factor for her reenlistment.

Notwithstanding, the petitioner's reenlistment was barred effective March 1, 1988, the date of her commanding officer's recommendation. Because homosexuality is a non-waivable moral disqualification, there were not any other additional administrative remedies

available to the petitioner and as a result, this action was filed on May 3, 1988.

The jurisdiction of the court was invoked under 28 U.S.C. §1331 (general Federal question jurisdiction) because the petitioner alleged a violation of her First and Fifth Amendment rights.

The petitioner attached a motion for preliminary injunction with her complaint, which sought declaratory and injunctive relief. On August 3, 1988, the district court issued a preliminary injunction which ordered, "...that the defendants be and hereby are directed to consider Sergeant Ben-Shalom's reenlistment without regard to her sexual orientation until further order of the court."

On August 11, 1988, the date the

petitioner's enlistment contract was to expire, she was informed that, although she otherwise met reenlistment criteria contained within Army Regulations AR 140-111, her request for reenlistment was denied and her current enlistment contract was extended pending judicial review.

Thereafter, petitioner's counsel informed the respondents that it was her position that the Army was in noncompliance with the court's order of August 3, 1988. When the respondents failed to respond to the petitioner's request to comply with the court's order, a motion for civil contempt was filed. On September 1, 1988, the district court held the Army in contempt for its failure to obey the court's order. On September 12, 1988, the Army reenlisted the

petitioner for six years on the condition that if the court's order is later vacated "...this enlistment will be voided." The respondents appealed from that order.

During the pendency of that appeal the district court ruled on the merits. In a decision entered January 10, 1989, the District Court for the Eastern District of Wisconsin held that Army Reserve Regulation AR 140-111, Table 4-2, be and hereby is declared unconstitutional on its face. Ben-Shalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis. 1989). The respondents appealed from that order as well and the appeals were consolidated in the Seventh Circuit Court of Appeals.

On August 7, 1989, the Court of Appeals reversed the district court's decision. Ben-Shalom v. Marsh, 881 F.2d

454 (7th Cir. 1989). The petitioner filed a petition for rehearing and rehearing en banc, which was denied in an order dated October 11, 1989. The petitioner then made a motion to stay the mandate. The Court granted that motion and the mandate was stayed to and including December 1, 1989.

It is noteworthy to realize that this case has no factual disputes whatsoever. There is no dispute that the petitioner is and continues to be an excellent soldier. There is no evidence of any misconduct on the petitioner's part, and that she is being disqualified from military service only because of her statements that she is a lesbian. The petitioner's argument throughout the many years of her litigation with the respondents has always been that to bar her

from serving in the military simply because of who or what she is or who or what she says she is violates the U.S. Constitution.

The respondents' position continues to be that allowing homosexuals in the military constitutes a threat to good order and discipline. However, the record does not reflect any study or empirical data which back up the respondents' conclusions. In fact, the respondents have suppressed studies which show that homosexuals are no less suitable for military service than other minority groups. Most recently, the Defense Personnel Security Research and Education Center (Perserec), a research organization for the Pentagon, issued a draft report dated December, 1988, to the

Defense Department[1]. The draft report was suppressed by Defense Dept. personnel for 10 months but was released to certain members of the Congress in late October, 1989. That report reached the startling conclusion that the military should reexamine its policies toward homosexuals because there is little, if any, evidence to support the respondents' claim that homosexuals are a detriment to the military.

Although the respondents were fully aware of the Perserec study, its existence was not revealed to Congress or the public until October of this year. Even in light of this report, the respondents continue to advocate the position that

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[1]Nonconforming Sexual Orientations and Military Suitability. Theodore R. Sarbin, Ph.D. and Kenneth E. Karols, M.D., Ph.D.

homosexuals, per se, are not suitable for military duty.

REASONS FOR GRANTING THE WRIT

I. THERE IS NO RATIONAL BASIS TO DENY REENLISTMENT IN THE MILITARY TO THE PETITIONER, ADMITTED BY THE RESPONDENTS TO BE AN EXCELLENT SOLDIER, SOLELY ON THE BASIS OF HER HOMOSEXUAL ORIENTATION WITHOUT EVIDENCE OF ANY TYPE OF MISCONDUCT.

There are no factual disputes in this case. No one denies that the petitioner is an exemplary soldier. She has had no problems in the past working with other soldiers and has, in fact, been singled out for her overall excellence. The respondents want to separate her from the military because she belongs to a group of individuals who, because of their status, allegedly threaten the good order and discipline of the military.

The equal protection clause of the Fourteenth Amendment to the U.S. Consti-

tution directs that no state shall "...deny to any person within its jurisdiction the equal protection of the laws." The Fifth Amendment's due process clause has long been held to bind the Fourteenth Amendment's equal protection anlaysis to actions by the Federal government. Bolling v. Sharpe, 347 U.S. 497 (1953). Under the most deferential standard of scrutiny, a government regulation that burdens a particular group will be presumed valid under the equal protection clause as long as that regulation "...rationally furthers some legitimate, articulated State purpose." McGinnis v. Royster, 410 U.S. 263, 270 (1972).

The group burdened by the Army Reserve Regulation in question are those individuals of homosexual orientation.

Petitioner is an admitted member of that group. There is no evidence in the record that the petitioner has engaged in conduct which violates military regulations. She is being denied reenlistment because she has acknowledged her membership in the burdened classification.

The issue of whether or not those of homosexual orientation should be granted suspect or quasi-suspect class status is argued below. The question here is whether there is a rational basis to deny membership in the military to those of homosexual orientation.

Those of homosexual orientation are the last minority group to which the Federal government sanctions outright discrimination without any evidence of individual misconduct by members of the group. This situation is not like the

case of Bowers v. Hardwick, 478 U.S. 186 (1986), in which the court was asked to find that previously criminalized acts of homosexual sodomy were protected by the due process clause of the Fourteenth Amendment. The case at bar is not a "conduct" case. The petitioner is simply asking to not be penalized because of who she is when that status has nothing to do with her abilities to be a good soldier. The respondents have never been able to produce any empirical data whatsoever which supports their position. In fact, a study commissioned by the Defense Department urges a reexamination of the military's policy on homosexuality. The Defense Personnel Security Research and Education Center (Perserec) generated a draft report for the Pentagon entitled "Nonconforming Sexual Orientations and

Military Suitability". That draft report was prepared by Theodore R. Sarbin, Ph.D., and Kenneth E. Karols, M.D., Ph.D. The Perserec report examines the existing scientific and social data and concludes that military policy on homosexuals should be reexamined.

> Studies of homosexual veterans make clear that having a same-gender or opposite-gender orientation is unrelated to job performance in the same way as being left--or right--handed (Williams and Weinberg, 1971).

Perserec report, page 33.

The Perserec report also concludes that homosexuals should be treated as a minority group along the same lines as ethnic or racial minorities:

> Our analysis directs us to regard people with non-conforming sexual orientation as a minority group. Our nation has a long history of successfully dealing with minority groups, particularly ethnic minorities. In the recent past, we have

> also learned how to integrate racial and other minority group, notably women, into nearly every aspect of political and social life. The suggestion that we perceive homosexual men and women as a minority group follows from our analysis of contemporary scientific social and legal observations. The social construction of homosexuals as minority group members is more in tune with current behavioral science theory than the earlier constructions: sin, crime and sickness.

Perserec report, page 33.

Rationality of a given policy, like beauty, is often in the eye of the beholder. What is rational to one may seem irrational to another based on those individuals differing backgrounds. However, from a legal perspective, it is difficult to support a government policy which holds that a particular group is detrimental to the military, when the military's own studies indicate just the

opposite. As further evidence of the irrationality of the respondents position is the obvious example of the petitioner who is not only an acceptable soldier, but one who excels. Petitioner is certainly not the only homosexual to be an excellent soldier. Other cases have reflected homosexual individuals who have excelled in military life. See Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989); Matlovich v. Secy. of Air Force, 591 F.2d 852 (D.C. Cir. 1978).

Finally, the respondents' argument, which is accepted by the Seventh Circuit Court of Appeals panel, that homosexuals should be denied military service because they are prone to engage in criminal sexual conduct, is also irrational. The Uniform Code of Military Justice (UCMJ) makes it a crime to engage in certain

types of sexual activity, including oral and anal sex. See Article 125, UCMJ, 10 U.S.C. §925. The statute does not differentiate between homosexual and heterosexual sodomy. It is illegal to engage in heterosexual acts of oral and anal sex, as well as homosexual acts of the same type. It is irrational to deny admittance to the military to one group of individuals (those of homosexual orientation) because some of the groups members may engage in criminal sexual conduct and not deny admittance to another group (heterosexuals) when some members of that group may also engage in that type of criminal sexual conduct.

Supreme Court precedent does not preclude a finding that there is no rational basis for the respondents' regulation barring those of homosexual

orientation. There is no evidence in the record of any empirical data supporting the respondents' position, and in fact the respondents were well aware of data generated by the defense department which contradicted that same policy. The petitioner has showed herself to be superbly qualified to serve her country.

The importance of this question to homosexuals in the United States cannot be underestimated. Although many homosexuals have no interest in joining the military, all have an interest in making sure that the Federal government does not, in any of its agencies, condone discrimination which does not rationally relate to any legitimate government interest. To allow this sort of legislation to continue would invite other government agencies to blatantly discrim-

inate against homosexuals in other areas not related to the military. If the respondents are allowed to continue an irrational policy which is based on prejudicial stereotypes and lacks empirical data to support it injures all homosexuals, whether in the military or not. The recent release of the defense department studies (Perserac) which indicate that homosexuals are as suitable to the military as heterosexuals and the public interest those reports have generated, underscores the belief of the petitioner that the time is ripe for the court to examine the military's policy towards those of homosexual orientation.

II. MILITARY REGULATIONS WHICH MANDATE DENIAL OF REENLISTMENT TO THOSE INDIVIDUALS WHO ADMIT TO HOMOSEXUAL ORIENTATION, BUT HAVE NEVER BEEN FOUND TO HAVE COMMITTED A HOMOSEXUAL ACT, UNREASONABLY CHILLS FREEDOM OF SPEECH.

The petitioner was denied reenlist-

ment in the military because of her statements that she was a lesbian. There is no dispute that the petitioner has the right to make those statements. The question is whether the respondents unreasonably chill her right to make such statements by withholding a valuable government benefit if she makes them.

This court, in Perry v. Sindermann, 408 F.2d 593,597 (1972) has held that the government cannot prevent indirectly that which it can't do directly, i.e. restrict the petitioner's rights to say who and what she is. The District Court, in its January 10, 1989, decision on the merits decided that the petitioner's speech was protected, but that the "...protection of the First Amendment in military life is not coextensive with that of civilian life." Appendix at A-69.

The court then analyzed whether the regulation protected a substantial government interest and also whether the regulation restricted speech more than was reasonably necessary to protect the substantial government interest. Id. citing Brown v. Glines, 444 U.S. 348, 353-55 (1979). The court found that the interests articulated by the respondents (listed in the decision, Appendix at A-71) were indeed substantial. However, the court decided that the regulation did not advance those government interests for the same reasons given above with regard to the equal protection argument. Appendix at A-75-76. In other words, because it is irrational to deny admittance in the military to individuals of homosexual orientation, it is just as irrational (i.e. unreasonable) to

restrict those individual statements regarding their sexual orientation.

First Amendment rights of a soldier are admittedly more restrictive than those of a civilian. However, that does not mean that the military has the right to unreasonably prevent a soldier from identifying who he or she is. This court should examine the petitioner's claim that the military is unreasonably restricting her right to identify herself in light of the fact that there is no military interest served by such restrictions.

III. INDIVIDUALS OF HOMOSEXUAL ORIENTATION ARE MEMBERS OF A GROUP WHICH IS ENTITLED TO STRICT SCRUTINY UNDER EQUAL PROTECTION ANALYSIS.

In the case of the three judge panel in Watkins v. United States, 837 F.2d 1428 (9th Cir. 1988), decision aff'd. en banc on other grounds, 875 F.2d 699 (9th

Cir. 1989), the majority gives an extensive analysis of why those of homosexual orientation should be entitled to strict scrutiny.

There is little doubt that homosexuals have suffered a history of purposeful discrimination. Homosexuals over the years have suffered and continue to suffer discrimination based on prejudice and unsupported stereotypes, which the petitioner, by her very success in the military proves wrong every day.

A class based on homosexual orientation is defined by a trait that there is no relationship to the individual's ability to contribute to the good of society or of the military. This is shown in the Perserec report which reaches a conclusion that homosexuality is unrelated to job performance in the

same way as being left or right handed. Perserec report at page 33. See also, High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987).

Homosexuals rarely possess the political power to effectively bring about the change in legislation necessary to end such discrimination. Rowland v. Mad River Local School District, 470 U.S. 1009 (1984) (Brennan, J., dissenting from denial of cert.). When that occurs, they must turn to the courts for protection.

The Court of Appeals in this case found that homosexuals were not without political power. In a footnote to the decision, the court stated

> Homosexuals are not without political power. Time magazine reports that one congressman is an avowed homosexual, and that there is a charge that five other top officials are known

> to be homosexual. Carlson, How to Spread a Sexual Smear, Time, June 19, 1989, at 33.

Appendix at A-51, n.9. It is difficult to see how the court could find that homosexuals have political power when the very title of the article indicates that being labeled a homosexual would be considered a sexual smear.

The fact that this court has ruled that private acts of consensual homosexual sodomy are not protected by the due process clause of the Constitution, Bowers v. Hardwick, 478 U.S. 186 (1986), does not preclude this court finding that those of homosexual orientation are entitled to suspect classification. Concurring opinion in Bowers specifically noted that an equal protection claim was not being advanced by the petitioner in that action. Bowers v. Hardwick at 196

n.8.

A recent Law Review article examines the relationship between the due process and equal protection clauses as they relate to sexual orientation. See Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, Cass R. Sunstein, 55 U. of Chicago Law Review, 1161 (1988). Professor Sunstein found that Bowers v. Hardwick does not preclude this court finding that deferential treatment of homosexuals is constitutionally impermissible under the equal protection clause. "The conclusion that the due process clause does not protect homosexual sodomy, does not resolve the question whether principles of equal protection forbid discrimination on the basis of sexual orientation." Sexual Orientation

and the Constitution, Sunstein, at 1178.

> It may be useful to conclude by suggesting that the legal regime produced by Watkins is coherent even in the face of Hardwick. Watkins makes it generally impermissible to single out gays and lesbians for a special disability; deferential treatment of that sort will face a large burden of justification. So long as Hardwick remains the law, however, measures that proscribe certain sexual activities may be upheld against the due process attack so long as the prohibitions apply regardless of sexual orientation. The requirement of generality operates as a political safeguard, insuring that if the heterosexual majority is to burden gays and lesbians, it must burden itself as well.

Id. at 1177-78.

There has been a number of disagreements in the Circuits as to the effect of Bowers v. Hardwick, supra, regarding this issue. See Watkins v. United States, supra; Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v.

Webster, 833 F.2d 97 (D.C. Cir. 1987). This court should rule conclusively as to the effect of Bowers v. Hardwick on equal protection claims.

IV. THE RESPONDENTS' DECISION TO DENY REENLISTMENT TO THOSE OF HOMOSEXUAL ORIENTATION SHOULD NOT BE GRANTED BROAD DEFERENCE BY THE COURT.

The panel in the Seventh Circuit Court of Appeals held that courts have little competence in reviewing decisions by the Armed Forces. Appendix at A-53. This type of decision, where there is no factual dispute and the issue is not one which requires particular military expertise (such as what type of weapons to use or strategies to employ) is of the type which the courts are well equipped to review. In Gilligan v. Morgan, 413 U.S. 1 (1973) the issues that were granted broad deference to the military concern the training, weaponry and orders

in the Ohio National Guard. That is not the case here. The issue is one of determining the constitutionality of a regulation regarding employment of a broad class of citizens, and has nothing to do with the technical aspects of the military. If the military attempted to enact regulations which deny individuals admittance on the basis of race, there is little doubt that this court would grant no deference whatsoever to the military's expertise on that subject. This court should thoroughly examine the respondents' alleged rationale for its policy denying admittance to those of homosexual orientation. This court should not rely on the conclusions advanced by the military for this policy, especially in light of the evidence which indicates that the conclusions are without founda-

tion. This court should closely examine the military's policy regarding homosexuality.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 88-2771 and 89-1213

MIRIAM BEN-SHALOM,

Plaintiff-Appellee,

v.

JOHN O. MARSH, JR., Secretary of the Army, VANCE COLEMAN, Commanding Officer, H.Q. 84th Division, U.S. Army Reserve, and JOHN ALLEN, Lt. Colonel, Commanding Officer, 5091st U.S. Army Reception Battalion,

Defendants-Appellants.

Appeal from the United States
District Court for the
Eastern District of Wisconsin.
No. 88-C-468--**Myron L. Gordon**, Judge.

ARGUED MAY 18, 1989--
DECIDED AUGUST 7, 1989

Before WOOD, JR., EASTERBROOK, and KANNE, Circuit Judges.

WOOD, JR., Circuit Judge. This case concerns an avowed homosexual, a lesbian, who has persistently sought and now

secured, with district court assistance, reenlistment in the Army.[1] The Army under its regulations seeks to void that reenlistment. As might be expected the issue is controversial, as evidenced by the number of amici curiae all supporting plaintiff Miriam Ben-Shalom.[2] The district court has entered a permanent injunction requiring the Army to continue the reenlistament of plaintiff Ben-Shalom without regard to her sexual orientation.

Background

Plaintiff is presently a sergeant in the United States Army Reserve performing duty with the 5091st U.S. Army Reception Battalion in Milwaukee, Wisconsin. There

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[1]The defendants are collectively referred to as the Army.

[2]Filing briefs as amici curiae are American Civil Liberties Union of Wisconsin Foundation, Inc., American Jewish Congress, Women's Legal Defense Fund, and American Psychological Association.

is no complaint about the actual performance of her military duties.

In 1976 plaintiff was discharged from the reserves pursuant to then-existing Army Regulation (AR) 135-178, para. 7-5(b)(6), which provided for the discharge of any soldier who "evidenced homosexual tendencies, desire or interest, but is without overt homosexual acts." Plaintiff promptly filed suit claiming that her discharge under that regulation violated her constitutional rights to free speech and privacy. Judge Evans viewed those regulations as overbroad under the First Amendment, and also as violative of plaintiff's constitutional right to privacy that, in Judge Evans' opinion, protected Ben-Shalom's sexual preferences. There was found no proof of nexus between sexual preference and military capabilities. Plaintiff was

ordered reinstated by Judge Evans for the remaining eleven months of her enlistment. Ben-Shalom v. Secretary of Army, 489 F. Supp. 964 (E.D. Wis. 1980) (Ben-Shalom I).

The Army did not appeal and the district court reinstatement order became final. After the Army failed to comply with the reinstatement order plaintiff sought to have the Army held in contempt. The district court, however, declined to enforce the reinstatement order, and instead ordered compensation for plaintiff's uncompleted enlistment term. That response did not satisfy plaintiff. On appeal, this court held in an unpublished order that the district court improperly used the civil contempt proceedings to reopen the legal or factual basis of the original reinstatement order. The district court's judgment was therefore

vacated and the case remanded. This court suggested in connection with the remand that the Army's only remedy was pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, but expressed no opinion on the merits of that possible effort. On remand the Army did test that remedy but failed in the district court, and subsequently in this court on appeal. Ben-Shalom v. Secretary of Army, 826 F.2d 722 (7th Cir. 1987). It was pointed out that a Rule 60(b) motion is no substitute for appeal and cannot be used merely to relitigate the merits of the case. The district court was therefore affirmed in its latest judgment, requiring that plaintiff actually be reinstated for the eleven-month balance of her original enlistment and not just compensated for it. The Army complied, but because protracted litigation delayed her

reinstatement significantly, plaintiff's enlistment did not expire until August 1988. That is where the current legal chapter begins.

While still serving her original enlistment (as extended by the district court's order) plaintiff sought to reenlist for another full six-year term. In response, plaintiff's commanding officer notified her in March 1988 that the Army was considering whether she should be barred from reenlistment under AR 140-111, Table 4-2, Rule E, on the ground that she is an admitted homosexual.[3] This is a new regulation, adopted

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[3]Table 4-2 sets forth certain nonwaivable moral and administrative disqualifications. Rule E sets forth the following disqualification:

> E. Questionable moral character, history of antisocial behavior, sexual perversion, homosexuality (includes an individual who is an admitted homosexual but as to whom there is no evidence

that they have engaged in homosexual acts either before or during military service, or has committed homosexual acts), or having frequent difficulties with law enforcement agencies. (See note 1.)

Notes:

1. Homosexual acts consist of bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification, or any proposal, solicitation or attempt to perform such an act. Individuals who have been involved in homosexual acts in an apparently belated episode, stemming solely from immaturity, curiosity, or intoxication, and absent other evidence that the individual is a homosexual, normally will not be excluded from service. A homosexual is an individual, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification. Any official, private, or public profession of homosexuality may be considered in determining whether an individual is an admitted homosexual.

after the prior regulation had been found unconstitutional. It governs the immediate reenlistment or extension of enlistment in the U.S. Army Reserve. That notice further advised plaintiff that her admission of homosexuality gave rise to a presumption that she was a homosexual, and that therefore she had thirty days within which to submit a response rebutting that presumption. In her response to the Army's notice, plaintiff again admitted that she is a lesbian. After considering her response, the Army notified plaintiff on April 7, 1988, that accordingly she was barred from reenlistment.

A month later plaintiff filed this new lawsuit, this time to be heard by Judge Gordon, charging that the regulation, which makes the status of homosexuality a nonwaivable disqualification to

reenlistment regardless of conduct, violates plaintiff's constitutional rights under the First and Fifth Amendments. The First Amendment claim was based on the fact that the only evidence of plaintiff's homosexuality was her own admission. Plaintiff argued that the new regulation had the effect of chilling her freedom of expression as she would no longer be able to make statements regarding her sexual orientation, statements that she would otherwise be free to make. Alternatively, plaintiff alleged that the regulation violated her Fifth Amendment right to equal protection of the law because the regulation discriminates on its face against a discrete and insular group to which plaintiff belongs. Plaintiff therefore sought a declaratory judgment that the pertinent part of the regulation is unconstitutional on its

face, and asked that the Army be affirmatively enjoined to consider plaintiff's reenlistment application without regard to her sexual orientation.

On August 3, 1988, a few days before plaintiff's extended enlistment was to expire, Judge Gordon granted her a temporary injunction to preserve her enlistment status quo pending final resolution of her case, and ordered the Army to consider plaintiff's reenlistment request without regard to her sexual orientation. The Army did as it was directed by the District court and found plaintiff to be otherwise qualified. However, the Army, instead of granting her a new reenlistment as ordered (which it considered to be a violation of its superseding regulations that had not yet been declared invalid), merely extended plaintiff's original enlistment pending

further review. In response plaintiff sought successfully to have the Army held in civil contempt for failing to fully comply with the court's order. A fine of $500 per day was imposed by the district court for plaintiff's benefit. The district court delayed the imposition of the fine to permit the Army time to apply to this court for a stay. Rather than seek a stay, the Army commplied with the order of the district court, conditionally reenlisted plaintiff for a new six-year term, and then appealed. Plaintiff's new reenlistment term was subject to the condition that if the district court's order was subsequently vacated, reversed, set aside, or otherwise terminated her new enlistment would be voided.

On January 10, 1989, the district court concluded the matter by holding

that the new regulation was unconstitutional on both grounds alleged by plaintiff.[4] Her First Amendment rights were found to have been violated by the Army's reliance only upon her admission of homosexuality without evidence that she had in fact committed homosexual acts. The district court also found that the Army had shown no basis to support its contention that acknowledgement of homosexuality constitutes reliable evidence of propensity to engage in homosexual conduct. In regard to plaintiff's equal protection claim, the district court found that a grouping of individuals based on sexual orientation constitutes a suspect classification, but that it was not necessary to subject that classification to strict scrutiny

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[4]The district court's opinion is reported at 703 F. Supp. 1372 (E.D. Wis. 1989).

because, in any evnet, the new regulation classification was not rationally related to any articulated legitimate governmental interest. Judge Gordon held that any regulation on the subject, in order to be valid, had to be targeted at sexual conduct, not just homosexual orientation.

The Army first appealed from the temporary injunction, and that appeal has been consolidated with its later appeal from the permanent injunction. The constitutionality of the Army's new regulation on homosexuality is now the issue.

First Amendment Issue

Judge Gordon, in his decision of January 10, 1989, declared AR 140-111, Table 4-2 to be unconstitutional on its face in violation of plaintiff's First and Fifth Amendment rights, and directed the Army to continue plaintiff's reen-

listment as previously ordered without regard to her sexual orientation. The district judge noted that the basic Army policy remained the same as it was in 1980, although the applicable regulation had been reworded. He also noted that the Army considers having a homosexual orientation to be incompatible with military service because the Army believes that the admission of homosexuality demonstrates a propensity to engage in homosexual conduct. The Army did not offer evidence that plaintiff has engaged in or attempted to engage in homosexual conduct. The regulation defines a homosexual, the district court also found, merely on the basis of one's sexual desires so that neither the actual commission of a homosexual act, nor the intent to commit one, need be an element in a discharge pursuant to the new

regulations.

That view of the new regulation led Judge Gordon to conclude, as Judge Evans had in Ben-Shalom I, that plaintiff's proclamations of lesbianism were protected speech. In analyzing the problem the district court sought guidance from Brown v. Glines, 444 US. 348 (1980). In Brown an officer challenged an Air Force regulation that required members of that service to obtain approval from the base commander before circulating petitions on an Air Force base. The officer was disciplined for circulating, without approval, a petition directed to Congress. The petition sought a change in the personal grooming standards for Air Force personnel because, among other things, it was claimed the standards caused racial tensions. The Court upheld the regulations as protecting a substan-

tial government interest unrelated to the suppression of free expression, with speech being restricted no more than was reasonably necessary for the government purpose. The substantial government interet was found to be morale, good order, and discipline--military matters that Congress and the Court have recognized require some flexibility be accorded to military commanders. Justice Brennan, however, in dissent labeled the majority reasons about the special nature and overhwelming importance of military necessity as being merely a series of platitudes. Brown, 444 U.S. at 368-69.

Judge Gordon, applying Brown to the similar government interests advanced by the Army in the present case, found those interests to be substantial without any serious question. The asserted government interets in the present case are the

ability of the military to maintain discipline, good order and morale; foster mutual trust and confidence among service members; insure the integrity of the system of rank and command; facilitate assignmetn and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy; recruit and retain members of military service; maintain the public acceptability of military service; and prevent breaches of security. These enumerated interests are set forth in AR 135-178, sec. 10-2.

Judge Gordon then narrowed the question to whether the pertinent new regulations swept more broadly than reasonably necessary to protect those government interests. The new regulation, he found, was premised on the following policy, also set forth in AR

135-178, sec. 10-2:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct, or who by their statements demonstrate a propensity to engage in homosexual conduct, seriously impair the accomplishment of the military mission. The presence of such members adversely affects the ability of the service to accomplish the enumerated government interests.

That policy, it was found, targets two groups of people, those who engage in homosexual conduct, and those who demonstrate a propensity to engage in homosexual conduct. The Army contended that plaintiff's admission that she is a lesbian brought her within the latter of the two groups. The district court found that the rewording of the new regulation, as compared with the original regulation found unconstitutional in Ben-Shalom I, was insufficient to cure the previous

finding of unconstitutionality. It was acknowledged that the new regulation no longer affects those who merely evidence "tendencies" or "interest" in homosexuality, but the new regulation continues "to affect those who by statements that they have a homosexual orientation acknowledge a 'desire' for homosexual conduct." The Army's argument that such a "desire" suggests a propensity to engage in actual homosexual conduct was rejected. Likewise the district court rejected the Army's contention that acknowledgement of being a lesbian without proof of actual homosexual conduct equals reliable evidence of "propensity". For the court to rely on the "obvious connection," and to use "common sense," as urged by the Army, was found by Judge Gordon to be "little more than a euphemism for prejudice." Judge Gordon found that the

regulation had "the effect of chilling [plaintiff's] freedom of expression because if the regulation is enforced she will no longer be able to make statements regarding her sexual orientation....," and that therefore the regulation is "facially violative of the First Amendment."

Judge Gordon's analysis is, as customary, thoughtful and articulate, and finds impressive support in Justice Brennan's dissent in Brown and elsewhere. But, being found by the majority opinion in Brown, as we see its application to the present case, we must come to a different conclusion. Brown upheld a regulation prohibiting the circulation of petitions by members of the armed forces, even a petition addressed to the Congress, and in spite of the fact that by statute a soldier has the right to

communicate directly with a member of Congress. Brown, 444 U.S. at 358. The Brown regulation was found to be constitutional because the regulation protected a substantial government interest, a military interest, unrelated to the suppression of free expression. It was pointed out, in substance, that

> the military is, by necessity, a specialized society separate from civilian society. Military personnel must be ready to perform their duty whenever the occasion arises. To ensure that they always are capable of performing their mission promptly and reliably, the military services must insist upon a respect for duty and a discipline without counterpart in civilian life.
>
> Speech that is protected in the civil population may...undermine the effectiveness of response to command. Thus, while members of the military services are entitled to the protections of the First Amendment, the different character of the military community and of the military mission requires a different application of those protec-

> tions. The rights of military men must yield somewhat to meet certain overriding demands of discipline and duty....Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base.

Brown, 444 U.S. at 354 (citations omitted).

We see in those words the common recognition that the military establishment is very different from civilian life. When necessary, the military must be able to protect and defend the United States. That is a most important government mission, a difficult, demanding and complex one. It requires a trained professional force of reliable, loyal, and responsive soldiers of high morale, with respect for duty and discipline, soldiers who can work together as a team to accomplish whatever missions they may be given by their commanders. Civilian society is not

subject to those sometimes harsh and specialized military demands, and fortunately need not be because our civilian society can depend on the military, which is. As Brown makes clear, Congress and the Supreme Court "have found that the special character of the military requires that civilian authorities accord military commanders some flexibility in dealing with matters that affect internal discipline and morale." Brown, 444 US. 360. We are directed to be careful not to circumscribe the authority of military commanders to an extent not authorized by Congress. Brown holds that "[t]he unrestricted circulation of collective petitions would imperil discipline. We find no legislative purpose that requires the military to assume the risk..." 444 U.S. at 360. Simiarly, we do not believe

that the Army must assume the risk that the presence of homosexuals within the service will not compromise the admittedly significant government interests asserted in AR 135-178, sec. 10-2.

Moreover, the new regulation we are now considering is a different regulation from that originally considered in Ben-Shalom I. The features then found objectionable have been substantially eliminated. Discharge of a soldier who "evidences homosexual tendencies, desire, or interest" is no longer broadly mandated. Ben-Shalom I, 489 F. Supp. at 971. That language was originally construed by the district court to infringe on a soldier's right "to meet with homosexuals and discuss current problems or advocate change in the status quo...[or] to receive information and ideas about homosexuality." 489 F. Supp.

at 974. That "tendency" and "interest" language is now gone. If, for example, a soldier desires to meet with homosexuals and discuss current problems or advocate change in the status quo, or to receive ideas about homosexuality, then that soldier, under this new regulation, is free to do so. This is now a new case, and not bound by the doctrines of collateral estoppel or res judicata. What remains in the new regulation is but a bar against persons who either admit a "desire" to commit homosexual acts or who have in fact committed homosexual acts.[5]

We are here concerned with plaintiff's forthright admission that she is a homosexual. That reasonably implies, at

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[5]As the regulation indicates, isolated instances of homosexual conduct, attributable to curiosity, immaturity or intoxication, will not automatically render the individual involved ineligible for military service.

the very least, a "desire" to commit homosexual acts. In determining the composition of the armed forces, the Army does not have to take the risk that an admitted homosexual will not commit homosexual acts which may be detrimental to its assigned mission. It is not disputed, the plaintiff and the court agree, that the Army has the right to enforce its regulation[6] prohibiting the actual performance of homosexual acts.[7] Cf. Bowers v. Hardwick, 478 U.S. 186 (1986).

We see more to the Army's argument about the "obvious connection" and "common sense" approach to homosexuals

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[6]Article 125 Uniform Code of Military Justice (10 U.S.C. §925).

[7]In Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), the plaintiff was a homosexual seaman, who had admittedly engaged in repeated homosexual acts on the Navy base in violation of the regulations. His discharge was upheld.

being integrated into the Army than did Judge Gordon when he labelled the argument a "euphemism for prejudice." At oral argument counsel for plaintiff stated that there was no basis for the Army's homosexual regulations, except prejudice. There no doubt is prejudice against homosexuals both in and out of the Army. That possibly may be abating to a degree. However, the Army should not be required by this court to asssume the risk, a risk it would be assuming for all our citizens, that accepting admitted homosexuals into the armed forces might imperil morale, discipline, and the effectiveness of our fighting forces. The Commander-in-Chief, the Secretary of Defense, the Secretary of the Army, and the generals have made the determination about homosexuality, at least for the present, and we, as judges, should not

undertake to second-guess those with the direct responsibility for our armed forces. If a change of Army policy is to be made, we should leave it to those more familiar with military matters than are judges not selected on the basis of military knowledge. We, as judges, although opponents of prejudice of any kind, should not undertake to order such a risky change with possible consequences we cannot safety evaluate. The Congress, as overseer of the Army and the other military branches, is also better equipped to make such determinations.

Even if we assume that the present regulation does have a chilling effect on protected speech by discouraging proclamations of homosexuality among the military personnel, we cannot say that that infringement rises to the level of being unconstitutional. As we have

noted, the branches of the military have great leeway in determining what policies will foster the military mission, and courts will rarely second-guess those decisions. This deference means, among other things, that policies that might not pass constitutional muster if imposed upon a civilian population will be upheld in the military setting. The court explained this distinction in Gordman v. Weinberger, 475 U.S. 503 (1986):

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."

> ..."[W]ithin the military community there is simply not the same [individual] autonomy as there is in the larger civilian community."

Goldman, 475 U.S. at 507 (quoting Orloff v. Willoughby, 345 US. 83, 92 (1953) and Parker v. Levy, 417 US. 733, 751 (1974) (other citations omitted).

In Goldman, the Supreme Court upheld a military restriction that directly infringed upon a soldier's religious freedom, protected by the Free Exercise Clause of the First Amendment. An Air Force regulation forbade the wearing of any headcovering indoors and the wearing of any but regulation headcoverings outdoors. Goldman, in Air Force officer, refused to stop wearing his yarmulke, which was a symbol of what all parties conceded to be his deep and genuine commitment to his Orthodox Jewish principles. The Air Force court-martialled Goldman for defying the regulation. The Air Force's justification for the

regulation and its enforcement against Goldman--the need for uniformity in military attire--was considered to be a subject best left to professional military people and the legislative branch, even though in the civilian world a similar interest would be insufficient to justify such infringement upon an individual's religious beliefs and practices. The Court stated:

> [W]hen evaluating whether military needs justify a particular restriction...courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.

Goldman, 475 U.S. at 507-08 (citations omitted). Under this standard, the Army's refusal to reenlist Ben-Shalom because she has declared herself to be homosexual does not cross the line into unconstitutional infringement.

Ultimately, however, Ben-Shalom's

First Amendment argument fails because it is not speech per se that the regulation against homosexuality prohibits. Ben-Shalom is free under the regulation to say anything she pleases about homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes. What Ben-Shalom cannot do, and remain in the Army, is to declare herself to be a homosexual. Although that is, in some sense speech, it is also an act of identification. And it is the identity that makes her ineligible for military service, not the speaking of it aloud. Thus, if the Army's regulation affects speech, it does so only incidentally, in the course of pursuing other legitimate goals. "[W]hen 'speech' and 'nonspeech' elements are combined in the

same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968). In O'Brien the Court rejected a First Amendment challenge to a statute that imposed criminal sanctions on a person who "knowingly destroys, knowingly mutilates, or in any manner changes" a draft registration certificate. The Court held that although burning draft cards was symbolic speech, it could yet be barred because the regulation passed this four-prong test:

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restric-

> tion on First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377. Because the government has a substantial interest in maintaining an efficient and easily administered system of raising armies, the O'Brien court ultimately held that the government could punish civilians for destroying draft registrations, although doing so would necessarily tend to chill symbolic speech.

The same may be said of this case, except with even more force because of Ben-Shalom's status as a soldier. The Army has determined that the presence of homosexual individuals within its ranks may compromise one or more of its military interests in its mission of protecting this country. Plaintiff can say what she wants to say about homosexuals, but if plaintiff admits she is one,

then the Army has the right to say something in response, and that is that she is therefore not acceptable in the armed forces.

Judge Gordon treated this problem as a First Amendment issue. On the assumption that it might be a borderline case we have responded on that basis, but we find absolutely no First Amendment violation. This case, however, does raise legitimate equal protection issues.

Equal Protection

Judge Gordon's equal protection analysis concisely sets forth the general considerations involved as well as could be done. We therefore borrow and paraphrase a part of his decision for our purposes. Our disagreement comes only with his application of equal protection principles in the military context.

Judge Gordon explained that plain-

tiff claims the regulation to be subject to heightened scrutiny because homosexuals, as defined merely by the status of having a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect class. A regulation based on such a classification, plaintiff claims, must fail because it is not necessary to achieve a compelling state end. Alternatively, plaintiff argues that the regulation fails rationally to further a legitimate, articulated government purpose.

The Army contends that the regulation does not violate the Fifth Amendment's equal protection guarantee; it satisfies the test of heightened scrutiny since it furthers compelling government interests. Moreover, the Army argues that homosexuals are not in fact a suspect class. The Army asserts that the

correct approach is to uphold the constitutionality of the regulation under the traditional test of deferential scrutiny because the regulation rationally furthers several legitimate government interests.

The Equal Protection Clause of the Fourteenth Amendment directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws." It is made binding upon the federal government by the Fifth Amendment's Due Process Clause, Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954), and Fifth Amendment equal protection claims are treated precisely the same as equal protection claims under the Fourteenth Amendment, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

There are three recognized levels of equal protection review--rational basis,

"somewhat heightened review," and "strict scrutiny"--which are described in Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985). See also id. at 469 (Justice Marshall's remarks about the classifications). In general, a government regulation will be presumed to be valid under equal protection analysis as long as the classification drawn by the regulation "rationally furthers some legitimate, articulated state purpose." McGinnis v. Royster, 410 US. 263, 270 (1973). Under this deferential standard of scrutiny, the classification is tested for a general relationship to the articulated government purpose, and it matters not that an individual member of the burdened class proves to be an exception. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 310-11 (1976). This judicial

deference is grounded in a constitutional presumption that "improvident [classifications] will eventually be rectified by the democratic processes." Cleburne, 473 U.S. at 440. However, when a regulation creates classifications based on "factors which are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," Cleburne, 473 U.S. at 440, then judicial deference gives way to heightened scrutiny.

Judge Gordon reasoned that the debate over whether sexual orientation constitutes a suspect or quasi-suspect classification has been obscured by a failure to differentiate adequately between a classification based on conduct and one based on status. In his view the regulation at issue creates a classifica-

tion based entirely on status. AR 140-111, Table 4-2, as Judge Gordon sees it, cannot be characterized as a classification based on conduct. The issue framed before the district court was whether homosexuals, defined by the status of having a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect or quasi-suspect class.

Here we must depart from Judge Gordon's analysis, in which he found that homosexuals constitute a suspect class, justifying heightened scrutiny of the regulation, and that the regulation fails to pass even the most deferential standard of review. Judge Gordon viewed the regulation as creating a classification based entirely on sexual orientation, mere status, and not conduct. Plaintiff is not, however, in the same

circumstances as the soldier in Rich v. Secretary of Army, 735 F.2d 1220 (10th Cir. 1984), who claimead that he was confused at one time about his sexual identity, that his sexual identity did not crystalize until after his enlistment, and that his earlier experiences had been heterosexual followed only by isolated homosexual episodes. In the present case, plaintiff is an admitted lesbian, there is no confusion about that. Her declaration indicates more than a mere homosexual tendency or interest, former criteria eliminated in the new regulation. The regulation now refers to one "who desires bodily contact between persons of the same sex" and "with the intent of obtaining or giving sexual gratification." By admitting to being a lesbian, plaintiff admits to what the regulation prohibits.

It is true that actual lesbian conduct has not been admitted by plaintiff on any particular occasion, and the Army has offered no evidence of such conduct. Judge Gordon found no reason to believe that the lesbian admission meant that plaintiff was likely to commit homosexual acts. We see it differently. Plaintiff's lesbian acknowledgement, if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct. Such an assumption cannot be said to be without individual exceptions, but it is compelling evidence that plaintiff has in the past and is likely to again engage in such conduct. To this extent, therefore, the regulation does not classify plaintiff based merely upon her status as a lesbian, but upon

reasonable inferences about her probable conduct in the past and in the future. The Army need not shut its eyes to the practical realities of this situation, nor be compelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts, a ban not challenged here. Plaintiff does not deny that she has engaged in or will engage in homosexual conduct. Plaintiff has admitted that she has a homosexual desire, but not necessarily that she intends to commit homosexual acts. The Army need not try to fine tune a regulation to fit a particular lesbian's subjective thoughts and propensities.

Judge Gordon held that the Army's regulation failed equal protection analysis even under the most deferential

standard of review. In our view, however, it is the deferential standard of review that is applicable and the Army satisfies that standard without any difficulty. Bowers v. Hardwick, 478 U.S. 186 (1986) arose from a state criminal case unrelated to the military, but nevertheless it has an impact on the Army's classification of homosexuals. Hardwick, a five to four decision, was a suit for declaratory judgment brought by Hardwick challenging a Georgia statute which criminalized sodomy. Hardwick anticipated being charged under the statute after engaging in sodomy with another consenting adult male while in the privacy of his own home. Although the Court analyzed the constitutionality of the statute on a due process rather than an equal protection basis, Hardwick nevertheless impacts on the scrutiny

aspects under an equal protection analysis. The majority held that the Constitution confers no fundamental right upon homosexuals to engage in sodomy. If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.[8] The Constitution, in light of Hardwick, cannot otherwise be rationally applied, lest an unjustified and indefensible inconsistency result.

Furthermore, even the dissenters in Hardwick did not necessarily preclude all regulation of homosexuality. Justice Blackmun, in dissent in Hardwick, described the issue as "the right to be

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[8]Any additional scrutiny is presently reserved for classifications by race, alienage, national origin, gender and illegitimacy. Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

left alone," contending that such conduct falls within a certain private sphere of individual liberty to be kept largely beyond the reach of government." 478 U.S. at 203. Justice Blackmun also noted, however, that the homosexual act involved in Hardwick occurred in a private home and did not interfere with the rights or interests of others. 478 U.S. at 206. The present case involves entirely different circumstances; plaintiff is a member of the armed forces and her conduct, at the very least, has an impact upon other soldiers. Justice Blackmun's comments in Hardwick, whatever their merit in the civilian world, are clearly not applicable to a lesbian in the military service. The privacy expectations of a civilian, wherever their outer limit may be, cannot be compared to the substantially more

limited privacy expectations accompanying military life. Plaintiff in the present case voluntarily sacrificed much personal privacy and liberty by deliberately seeking to be in the Army where privacy and liberty are necessarily at a premium.

In a recent en banc case, Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989), the Ninth Circuit considered a case somewhat similar to the present case. The Watkins majority held that the Army was equitably estopped from refusing to reenlist Watkins on the basis of his homosexuality because the Army had overlooked his homosexuality in the past. Estoppel was not made an issue in the present case, although possibly it could have been. Therefore, although we find the Ninth Circuit's estoppel application doubtful, we need not reach that issue.

Judge Norris, however, in a concur-

rence joined by Judge Canby, would have decided Watkins against the Army on equal protection grounds. Judge Norris stated that homosexuals are entitled to suspect class protection. Discrimination against homosexual orientation, he reasoned, is "about as complete as one could imagine" under the regulations. Watkins, 875 F.2d at 716. Judge Norris disregarded Hardwick because it was decided on due process, not equal protection grounds. Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987), was also considered by Judge Norris. The Padula court rejected an equal protection challenge to the FBI's policy of not hiring homosexuals. That holding was likewise rejected by Judge Norris on the basis that the Padula court summarily rested its decision on the false premise that Hardwick foreclosed any finding that homoxexuals are a

suspect class. We, however, find no fault with Padula and believe its equal protection reasoning to be as applicable to the Army as to the FBI.

Judge Norris further rejcted the Army's asserted justifications because he explained that they illegitimately cater to private biases. Watkins, 875 F.2d at 728. We respectfully disagree, as we believe that this particular classification is supported by military considerations and should be left to the Army. We do not believe that the concerns set forth in the military policy and regulation can be so easily dismissed as mere prejudice, though individual prejudice no doubt exists in the military and elsewhere. The new regualtion, we find, clearly promotes a legitimate government interest sufficient to survive rational basis scrutiny. We agree with Judge

Hall, who wrote in dissent in Watkins, that "[t]here is no doubt that the majority's intrusion into military affairs, unjustified by important federal interests, will have a disruptive effect upon military discipline." Watkins, 875 F.2d at 736. We need not pursue all the equal protection avenues thoroughly explored by Judge Norris in his concurrence as we find them unpersuasive in the military context. On this controversial subject unanimity is not to be expected as respectable arguments may be made on both sides of the issue.

Homosexuals have suffered a history of discrimination and still do, though possibly now in less degree. We do not see, however, that the new regulation embodies a gross unfairness in the military context so inconsistent with equal protection as to be termed "invidi-

ous." In these times homosexuals are proving that they are not without growing political power. It cannot be said "they have no ability to attract the attention of the lawmakers." Cleburne, 473 U.S. at 445. A political approach is open to them to seek a congressional determination about the rejection of homosexuals by the Army.[9] We are, however, unwilling to substitute a mere judge-made rule for the Army's regulation or to act in an executive or legislative fashion.

Conclusion

Gilligan v. Morgan, 413 U.S. 1

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[9]Homosexuals are not without political power. Time magazine reports that one congressman is an avowed homosexual, and that there is a charge that five other top officials are known to be homosexual. Carlson, How to Spread a Sexual Smear, Time, June 19, 1989, at 33. Support for homosexuals is, of course, not limited to other homosexuals. The Chicaago Tribune, on Monday, June 26, 1989, reported that the Mayor of Chicago participated in a gay rights parade on the preceding weekend.

(1973) arose out of tragic events in 1970 at Kent State University in Ohio. The issue on appeal concerned the training, weaponry, and orders in the Ohio National Guard. Although Gilligan may be a much clearer case than the present one, Gilligan plainly sets forth the general policy for courts to follow in approaching military matters:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible--as the Judicial Branch is not--to the electoral process. Moreover, it is difficult to conceive of an area of governemntal activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decision is appropriately vested in

> branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlines our entire constitutional system...

413 U.S. at 10. We find these principles, though the facts are considerably different, nevertheless to be as applicable to the present case as they were in Gilligan, and we have sought to apply them.

This case accordingly is reversed and remanded to the district court for the vacation of any contaempt order against the Army that may remain, for dissolution of the permanent injunction, and for dismissal of the case. The Army shall be at liberty to apply its current regulation to plaintiff's conditional reenlistment in accordance with this opinion. The parties shall bear their respective costs.

REVERSED AND REMANDED.

A true Copy:
Teste:

_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MIRIAM BenSHALOM,

Plaintiff,

v. Case No. 88-C-468

JOHN O. MARSH, JR.,
Secretary of the U.S. Army;
COMMANDING OFFICER H.Q.,
84th Division, U.S. Army Reserve;
COMMANDING OFFICER 5091st
U.S. Army Reception Battalion,

Defendants.

DECISION AND ORDER

Sergeant Miriam BenShalom has filed this action seeking to have declared as unconstitutional the Army Reserve Regulation, AR 140-111, Table 4-2, that bars reenlistment to any serviceperson who declares himself or herself to have a homosexual orientation. Sergeant Ben-Shalom is a self-declared lesbian who, on the basis of that declaration, was denied reenlistment by the Army Reserves. The matter is before the court on cross

motions for summary judgment. For reasons stated herein, the court finds that Army Reserve Regulation AR 140-111, Table 4-2, violates the plaintiff's first and fifth amendment rights and, therefore, is constitutionally void on its face.

BACKGROUND

The facts are uncontested, Sergeant BenShalom enlisted in the Army Reserve in November 1974. At various times during her enlistment, she publicly acknowledged that she is a lesbian. On December 1, 1976, she was discharged solely because of her status as a person with a homosexual orientation.

The discharge was effectuated under Army Reserve Regulation AR 135-178, þ7-56(E), which allowed for the discharge of any soldier who "evidences homosexual tendencies, desire, or interest, but is

without overt homosexual acts." There was no proof that Sergeant BenShalom had engaged in homosexual acts or had done anything that could be interpreted as a homosexual advance toward another female soldier. By all indications, Sergeant BenShalom was an excellent soldier with an exemplary military record.

Sergeant BenShalom successfully brought a mandamus action seeking reinstatement. Another branch of the district court held that the army regulations then at issue violated her first amendment rights of free speech and association as well as her constitutionally protected right to privacy. BenShalom v. Secretary of Army, 489 F. Supp. 964, 976 (E.D.Wis. 1980) (hereafter BenShalom I). Vindication, however, was slow in coming. As late as August 1987, seven years after the district court

ordered reinstatement, the Army resisted the reinstatement on the ground that the original regulations under which she had been discharged had been reworded. In ordering her reinstatement, the court of appeals for the seventh circuit stated:

> When Benshalom is returned to the Army, the Army is prohibited from discriminating against her because she professes to be a lesbian...A change in the Army regulations, which the Secretary now claims would prohibit BenShalom from serving in the Reserves, cannot alter the right of BenShalom which was established in Judge Evans' 1980 opinion.

BenShalom v. Secretary of Army, 826 F.2d 722, 724 (7th Cir. 1987).

Sergeant BenShalom was finally reinstated in September 1987, almost eleven years after she had been unconstitutionally discharged. Her enlistment period was due to expire on August 11, 1988, and she timely requested reenlistment for a six-year term; that request

was denied on April 7, 1988. The revised regulations which the Army applied to bar her reenlistment made the status of homosexual a "nonwaivable moral and administrative disqualification." AR 140-111, Table 4-2. Sergeant BenShalom was denied reenlistment on the basis of the same earlier verbal declarations that had previously been the cause of her unlawful discharge.

Sergeant BenShalom filed the instant lawsuit on May 3, 1988. In an effort to preserve the status quo pending resolution of this action, she also filed a motion for a preliminary injunction. The motion was granted on August 3, 1988, and the Army was directed to consider Sergeant BenShalom's reenlistment without regard to her sexual orientation. In response to this court's August 3, 1988;, order, the Army considered Sergeant

BenShalom's reenlistment request without regard to her sexual orientation and determined that she otherwise satisfies all criteria for reenlistment. Nevertheless, the Army refused to reenlist her; instead, they chose to extend her prior enlistment. After being adjudged in contempt of court on September 1, 1988, the Army finally reenlisted Sergeant BenShalom pending the outcome of this case.

The uncontested factual situation today is very similar to that of 1980. The only real differences are the rewording of the regulations at issue and the fact that Sergeant BenShalom was denied reenlistment instead of being discharged. The basic policy remains the same: the Army considers those people with the <u>status</u> of having a homosexual orientation to be incompatible with

military service because the Army believes such people, by their statements, demonstrate a propensity to engage in homosexual conduct. Today, as in 1980, there is no allegation that Sergeant BenShalom has engaged in or attempted to engage in homosexual conduct of any type.

The Army regulation in question contains a list of numerous "nonwaivable moral and administrative disqualifications" to reenlistment. In that context, Table 4-2 of AR 140-111 places homosexuality in the following category:

> Rule E: Disqualification: Questionable moral character, history of antisocial behavior, sexual perversion, homosexuality (includes an individual who is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service, or has committed homosexual acts), or having frequent difficulties with law enforcement agencies. (see note 1.)

The regulation defines a homosexual as "an individual, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification. Any official, private, or public profession of homosexuality may be considered in determining whether an individual is an admitted homosexual." AR 140-111, Table 4-2, note 1. A homosexual act is defined as "bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification, or any proposal, solicitation or attempt to perform such an act." Id.

The regulation in question defines a homosexual on the basis of one's sexual desires. Neither the actual commission

of a homosexual act nor the intent to commit one is an element of the definition. If a person, such as Sergeant BenShalom, has the status of having a homosexual orientation and that person engages in speech which discloses or otherwise acknowledges that status, then that person is subject to an automatic, nonwaivable disqualification to reenlistment, regardless whether that person has engaged in or intends to engage in actual homosexual conduct.

The regulation also includes the following caveat:

> Individuals who have been involved in homosexual acts in an apparently isolated episode, stemming solely from immaturity, curiosity, or intoxication, and absent other evidence that the individual is a homosexual, normally will not be excluded from service.

AR 140-111, Table 4-2, note 1.

It follows that the regulation in

question does not penalize the commission of homosexual acts per se. If a person with a heterosexual orientation engages in homosexual conduct, that person can avoid the consequences of AR140-111 upon proof of his or her heterosexual orientation. In other words, status based on heterosexual orientation may be a defense to the commission of homosexual acts, and a person with a heterosexual orientation may engage in conduct which is prohibited on the part of a person with a homosexual orientation.

THE FIRST AMENDMENT

The plaintiff argues that AR140-111, Table 4-2 has the effect of chilling her freedom of expression because if the regulation is enforced, she will no longer be able to make statements regarding her sexual orientation, statements which would otherwise be

perfectly legal. In this regard, she points to her earlier case, BenShalom I, wherein she successfully challenged her prior discharge for making the same statements at issue in the instant case.

The Secretary argues that Sergeant BenShalom's statements about her sexual orientation are not protected expressions. Rather, the statements are admissions that she falls within a classification of people whose presence in the Army is properly deemed to be incompatible with military service. The Secretary states that "the regulation simply bars from reenlistment any servicemembers who engage, have engaged, or likely will engage, in sexual conduct that Congress has criminalized, see 10 US.C. §925 [sodomy], and that the military has deemed is incompatible with the military mission." Defendants'

Memorandum in Support of its Motion at 24-25. The Secretary concludes that the regulation "protect[s] a substantial Government interest unrelated to the suppression of free expression." Brown v. Glines, 444 U.S. 348, 354 (1979). The Secretary asserts that by acknowledging that one has a homosexual orientation, one admits that one is likely to engage in criminal acts of sodomy, and there is a substantial government interest in preventing such criminal acts.

The Secretary further argues that BenShalom I did not hold that Sergeant BenShalom's first amendment rights were violated by her discharge for statements that she made about her sexual orientation. Rather, the secretary asserts that the Army's previous regulation was struck down under the first amendment overbreadth doctrine. This contention is

unpersuasive and squarely contradicted by Judge Evans' ruling in BenShalom I:

> [T]he court ie empowered to reinstate her on the grounds that the discharge violated her First Amendment rights if the restrictions imposed upon those rights cannot be justified. [citations omitted] As stated in Perry v. Sindermann, supra: "for at least a quarter-century, this court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny ;him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. ..."

BenShalom I, 489 F. Supp. at 972.

Judge Evans then made the reference to the overbreadth doctrine as indicated by the defendants, but added:

> Nevertheless, the extremely broad unconstitutional sweep of this regulation is evidence by the fact that one such as Ms. BenShalom could unquestionably

be included within its sweep.

> If the regulation sweeps so broadly that it infringes on First Amendment freedoms, it is the "delicate and difficult task" of the court to determine whether the restrictions on those freedoms can be tolerated.

BenShalom I, 489 F. Supp. at 973.

Other courts have similarly interpreted BenShalom I to have held that Sergeant BenShalom's statements constitute protected speech. BenShalom v. Secretary of Army, 826 F.2d 722, 724 (7th Cir. 1987) ("The district court held in its 1980 opinion that BenShalom had a First Amendment right to claim to be a lesbian."); accord, Watkins v. Army, 847 F.2d 1329, 1334-35 (9th Cir. 1988), reh'g en banc ordered, 847 F.2d 1362 (9th Cir. 1988); Matthews v. March, No. 82-0216P, slip op. at 18, 21 (D.Me. April 3, 1984); but see Pruitt v. Weinberger, 625 F. Supp. 625, 627 (C.D. Cal. 1987).

BenShalom I held that Sergeant BenShalom's statements were protected speech, and the Secretary may not be heard now to assert the contrary. Eilrich v. Remas, 839 F.2d 730, 633 (9th Cir. 1988). However, the protection of the first amendment in military life is not coextensive with that of civilian life. Parker v. Levy, 417 US. 733 (1974). Thus, we arrive at the crucial questions: first, whether the regulation protects a substantial government interest; and second, whether the regulation restricts speech no more than is reasonably necessary to protect the substantial government interest. Brown v. Glines, 444 U.S. 348, 353-55 (1979).

Glines involved the on-base circulation of a petition among service personnel in violation of an air force regulation that required prior authorization

for distribution of written material by the base commander. The substantial government interests in Glines that justified dilution of first amendment protections in the military context were the "overriding demands of discipline and duty ... [which are] vital prerequisites for military effectiveness." Glines, 444 U.S. at 354. The loss of control by a base commander over written material distributed to service personnel was held to diminish his ability to avert potential disruptions and maintain internal discipline. Glines, 444 US. at 357 Only written materials that "pose[d] a clear danger to the good order of [the] troops" were the target of the regulation. Id.

The Secretary asserts that the substantial government interests that are protected by the regulation in the instant case are the ability of the

military to:

> a. Maintain discipline, good order and morale.
>
> b. Foster mutual trust and confidence among service members.
>
> c. Insure the integrity of the system of rank and command.
>
> d. Facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy.
>
> e. Recruit and retain members of military service.
>
> f. Maintain the public acceptability of military service.
>
> g. Prevent breaches of security.

AR 135-178, þ10-2.

There can be no serious question that the foregoing government interests are substantial. Certainly they constitute "vital prerequisites for military effectiveness." Glines, 444 US. at 354. Thus, the first part of the test, as

stated in Glines, is satisfied to the extent that the Secretary has invoked substantial government interests.

The question, therefore, narrows to whether the regulation sweeps more broadly than is reasonably necessary to protect the asserted government interests. The regulation is premised on the following policy:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct, or who by their statements demonstrate a propensity to engage in homosexual conduct, seriously impair the accomplishment of the military mission. The presence of such members adversely affects the ability of the service to [accomplish the enumerated government interests].

AR 135-178, þ10-2.

The policy as enunciated in AR 135-178, þ10-2, targets two groups of people for regulation: first, those who engage

in homosexual conduct and second, those who by statements demonstrate a propensity to engage in homosexual conduct. A statement that acknowledges that one has a homosexual orientation places on in the second group even though there be no additional evidence of propensity. This is precisely what has happened to the plaintiff herein. The inclusion of persons who, by their statements, acknowledge that they have a homosexual orientation within the sweep of the regulation causes the regulation to fail the second part of the test enunciated in Glines. In BenShalom I, Judge Evans wrote:

> Ms. BenShalom engaged in no known homosexual activity. She did not advocate homosexuality to anyone while on duty. Her homosexuality caused no disturbances except in the minds of those who chose to prosecute her. In fact, the record is clear that her sexual preferences made no difference

> to her immediate supervisors or her students. The court is satisfied from the record that her sexual preferences had as much relevance to her military skills as did her gender or the color of her skin. The broad sweep of this regulation substantially impinges the First Amendment rights of every soldier to free association, expression, and speech.

BenShalom 1, 489 F. Supp. at 973-74.

The only legally significant differences between the facts confronting the court in BenShalom I and the facts confronting us today is the rewording of the regulation in question. In BenShalom I, the regulation allowed for the discharge of any soldier who "evidences homosexual tendencies, desire, or interest, but is without overt homosexual acts." Id. at 969. The Secretary has revised the regulation so that it no longer affects those who evidence "tendencies" or "interest" in homosexuality. However, the regulation today

continues to affect those who by statements that they have a homosexual orientation acknowledge a "desire" for homosexual conduct. Such a "desire," in the view of the Secretary, belies a propensity to engage in actual homosexual conduct. In this regard, Judge Evans accurately observed:

> Just as some heterosexuals have, throughout human history, chosen to forego sexual activity for a variety of reasons, it cannot be assumed that all who have personalities oriented toward homosexuality necessarily engage in homosexual conduct.

BenShalom I, 489 F. Supp. at 975.

Just as was the case in BenShalom I, the court today "can see no detrimental effect on any legitimate military interest caused by a soldier who merely "evidence" ... a ... "desire or interest' in most anything, including homosexuality." Id. at 974. The Secretary has

offered the court ;no basis to support the contention that acknowledgment of status equals reliable evidence of propensity. The court is asked to rely on the "obvious connection" and to use "commonsense." In this context, the word "commonsense" amounts to little more than a euphemism for prejudice. The court must decline to give such bias a sanctuary in our constitutional jurisprudence. The regulation is facially violative of the first amendment because it unreasonably chills the right to freedom of speech of individuals such as the plaintiff.

EQUAL PROTECTION

Sergeant BenShalom claims that her fifth amendment right to equal protection of the law is violated by Army Reserve Regulation AR 140-111, Table 4-2. She argues that the regulation is subject to

heightened scrutiny because homosexuals, as defined by the status of having a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect class. A regulation based on such a classification, she argues, must fail because it is not necessary to achieve a compelling state end. Alternatively, Sergeant BenShalom argues that the regulation fails rationally to further a legitimate, articulated state purpose.

The Secretary argues that homosexuals are not a suspect class. But in the event that homosexuals are held to be a suspect class, the Secretary contends that the regulation does not violate the equal protection clause because it satisfies the test of heightened scrutiny since it furthers compelling government interests. Finally, the Secretary

asserts that the correct approach is to uphold the constitutionality of the regulation under the traditional test of deferential scrutiny because the regulation rationally furthers several legitimate state interests.

The equal protection clause of the fourteenth amendment directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause is made binding upon the federal government by the fifth amendment's due process clause, Bolling v. Sharpe, 347 U.S. 497, 498-99 (1953), and "fifth amendment equal protection claims are treated precisely the same as equal protection claims under the fourteenth amendment." Weinberger v. Wissenfield, 420 US. 636, 638 n.2 (1975).

It is a general rule that government regulations will be presumed to be valid

under the equal protection clause as long as the classification drawn by the regulation "rationally furthers some legitimate, articulated state purpose." McGinnis v. Royster, 410 U.S. 263, 270 (1972). Under this deferential standard of scrutiny, the classification is tested for a general relationship to the articulated state purpose, and it matters not that an individual member of the burdened class proves to be an exception. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 310-11 (1975). This judicial deference is grounded in a constitutional presumption that "improvident [classifications] will eventually be rectified by the democratic processes." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1984).

When a regulation creates classifications based on race, alienage, or

national origin, judicial deference gives way to heightened scrutiny. These classifications are considered suspect because they are based on "factors which are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." Cleburne, 473 U.S. at 440.

The debate over whether sexual orientation constitutes a suspect of quasi-suspect classification has been blurred by a failure adequately to differentiate between classifications based on conduct and those based on status. The regulation at issue in this case creates a classification based entirely on status. AR 140-111, Table 4-2, cannot be characterized as a classification based on conduct. The issue before the court is whether homosexuals,

defined by the status of having a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect or quasi-suspect class.

In Bowers v. Hardwick, 478 U.S. 186 (1986), the Court held that there is no constitutionally protected privacy right to engage in consensual acts of homosexual sodomy. The court of appeals for the ninth circuit has noted that:

> [A]lthough Hardwick held that the due process clause does not prevent states from criminalizing acts of homosexual sodomy [cite omitted], nothing in Hardwick actually holds that the state may make invidious distinctions when regulating sexual conduct...
>
> ...While it is not our role to question Hardwick's concerns about substantive due process and specifically the right to privacy, these concerns have little relevance to equal protection doctrine. The right to equal protection of the laws has a clear basis in the text of the Constitution.

Watkins v. U.S. Army, 847 F.2d 1329, 11340, 1341 (9th Cir. 1988).

In Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987), the court decided that homosexuals were not a suspect or quasi-suspect class "when defined as persons who engage in homosexual conduct." The court was careful to stress that the classification then under scrutiny "focus[ed] only on homosexual conduct, not homosexual status." Id. The Padula court held that the Supreme Court's decision in Hardwick foreclosed efforts to make practicing homosexuals a suspect class. Padula, 822 F.2d at 103.

In an equal protection context, Padula and Hardwick can only be reasonably construed as standing for the proposition that classifications are not subject to strict scrutiny when defined by homosexual conduct that rises to the

level of criminal sodomy. Doe v. Casey, 796 F.2d 1508, 1522 (D.C. Cir. 1986) ("[Hardwick] did not reach the difficult issue of whether an agency of the federal government can discriminate against individuals merely because of sexual orientation." (emphasis in the original). In Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985), the court rejected an equal protection claim challenging a Texas statute that criminalized homosexual sodomy. The court declined to hold that homosexuals, defined by conduct, constituted a suspect of quasi-suspect class. Id. In denying a petition for rehearing en banc, the court took care to distinguish between conduct and status by noting that "[t]he statute is directed at certain conduct, not at a class of people." Baker v. Wade, 774 F.2d 1285, 1287 (5th Cir. 1985).

In Watkins v. U.S. Army, 847 F.2d 1329, 1349 (9th Cir. 1988), reh'g en banc ordered, 847 F.2d 1362 (9th Cir. 1988), the court held that homosexuals constitute a suspect class when defined by status. The facts in Watkins are very similar to those in the instant case; both cases involved essentially the same army regulation that makes homosexuality a nonwaivable bar to reenlistment.

Homosexuals have suffered a history of purposeful discrimination. Justice Brennan has noted that "homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely ... to reflect deep-seated prejudice rather than ... rationality." Rowland v. Mad River Local School District, 470 U.S. 1009, 1014 (1985) (dissenting from denial of cert.).

Such hostility is evident in the very pleadings in this case wherein homosexuals are analogized to kleptomaniacs and arsonists. See Defendants' Memorandum in Reply to Plaintiff's Brief in Opposition to Motion to Dismiss, p. 10.

The Secretary has continuously characterized homosexuals as a group defined by the desire and intent to engage in criminal acts of sodomy. Yet not one shred of evidence as been presented to the court to show that homosexuals as a group share a compelling desire to commit that particular form of sexual conduct. The court is asked by the Secretary to hold that homosexual orientation is inherently intertwined with a desire and intent to commit criminal acts of sodomy. To do so is to create a class based on prejudicial notions of what homosexuals are sup-

posedly like. This type of discrimination, based on unsupported stereotypes, is precisely the type of discrimination that requires enhanced judicial scrutiny. Cleburne, 473 U.S. at 44; High Tech Gays v. Defense Indust. Sec. Clear. Off., 668 F. Supp. 1361, 1369 (N.D. Cal. 1987).

It is also clear that a class based on homosexual orientation is defined by a trait that bears no relationship to an individual's ability to contribute to the good of society. In Benshalom I, Judge Evans held that:

> [T]he record is clear that [BenShalom's] sexual preferences made no difference to her immediate supervisors or her students. The court is satisfied form the record that her sexual preferences had as much relevance to her military skills as did her gender or the color of her skin.

BenShalom I, supra, 489 F. Supp. at 973-74; accord, Watkins, supra, 847 F.2d at 1346; High Tech Gays, supra, 668 F.Supp. at 1369-70.

In only a very few communities do homosexuals possess the political power effectively to obtain redress from invidious discriminations in the political arena. It is estimated that homosexuals constitute between 8% and 15% of the population. Rowland v. Mad River Local School District, 470 U.S. 1009, 1014 n.7 (1984) (Brennan J. dissenting from denial of cert.). Homosexuals constitute a discrete and insular group subject to potential prejudicial political power. Watkins, supra, 847 F.2d at 1348-49.

The court concludes that homosexuals as defined by the status of having a particular sexual orientation, constitute a suspect class for the purposes of the equal protection doctrine. However, it is unnecessary for the court to subject the classification to strict scrutiny because the court finds that the classi-

fication fails even the most deferential standard of review. The classification is not rationally related to any articulated legitimate government interest. McGinnis v. Royster, 410 U.S. 263, 270 (1972).

The court recognizes that the government interests articulated by the Secretary are indeed compelling. The problem is that none are rationally advanced by an Army regulation which distinguishes military personnel on the basis of their sexual orientation. The elimination of all soldiers with homosexual orientations from the ranks of the Army is not rationally related to the advancement of any compelling government interest. It has already been noted that sexual orientation is a trait that bears no relationship to an individual's ability to perform or contribute to the

military, and it is not rational to hold that there is a general relationship between the trait upon which the classification is based and the advancement of any of the articulated military interests.

The military does not have a legitimate interest in the regulation of sexual conduct of service personnel. It is reasonable to say that regulation of sexual behavior is rationally related to each of the articulated government interests. But such regulation must be targeted at the conduct itself and cannot be based on prejudicial stereotypes of what people with certain orientations are like.

The challenged regulation can survive deferential scrutiny only if the Secretary is correct in the assertion that the status-conduct distinction is

bogus. The Secretary insists that the regulation is aimed at conduct and that we must presume a correlation between orientation and conduct. I disagree.

In Baker v. Wade, 774 F.2d 1285, 1287 (5th Cir. 1985), the court noted that "[t]hough the conduct be the desire of the bisexually or homosexually inclined, there is no necessity that they engage in it." In Cyr v. Walls, 439 F. Supp. 697, 702 (N.D. Tex. 1977), the court stated that it "can take notice of the logical distinction between gay individuals who simply prefer the companionship of members of their own sex and homosexual individuals who actively practice homosexual conduct."

A prevailing party in any civil action against the United States, or any agency or any official of the United States acting in his or her official

capacity, is entitled to a reasonable attorney's fee unless the position of the United States was substantially justified or other conditions exist which would make an award unjust. 28 U.S.C. §2412. In the case at bar, the plaintiff is clearly the prevailing party in all respects. It is equally clear that the position taken by the United States was not substantially justified. Accordingly, the plaintiff will be allowed 30 days from the date of this decision and order to serve and file her application for fees and other expenses in accordance with 28 US.C. §2412(B). The government will be allowed 10 business days from the date of the filing of the application to serve and file its objections, if any concerning the reasonableness of the requested amount.

CONCLUSION

Therefore, IT IS ORDERED that the defendants' motion for summary judgment be and hereby is denied.

IT IS ALSO ORDERED that the plaintiff's cross motion for summary judgment be and hereby is granted.

IT IS FURTHER ORDERED that Army Reserve Regulation AR 140-111, Table 4-2, be and hereby is declared unconstitutional on its face.

IT IS FURTHER ORDERED that the defendants be and hereby are directed to continue Sergeant BenShalom's reenlistment without regard to her sexual orientation.

IT IS FURTHER ORDERED that the clerk of this court enter judgment in favor of the plaintiff, with costs.

Dated at Milwaukee, Wisconsin, this 10th day of January, 1989.

/s/ Myron L. Gordon
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MIRIAM BenSHALOM,

Plaintiff,

v. Case No. 88-C-468

JOHN O. MARSH, JR.,
Secretary of the U.S. Army;
COMMANDING OFFICER H.Q.,
84th Division, U.S. Army Reserve;
COMMANDING OFFICER 5091st
U.S. Army Reception Battalion,

Defendants.

DECISION AND ORDER

Sergeant Miriam BenShalom has filed this action seeking to have declared as unconstitutional the Army Reserve Regulation, AR 140-111, Table 4-2, that bars reenlistment to any serviceperson who declares himself or herself to have a homosexual orientation. Sergeant Ben-Shalom is a self-declared lesbian who, on the basis of that declaration, has been denied reenlistment by the Army Reserves. Her current enlistment contract expires

on August 11, 1988. In an effort to preserve the status quo pending resolution of her action, Sergeant benShalom has moved for a preliminary injunction. For the reasons stated herein, I will grant the motion.

The facts are uncontested. Sergeant benShalom has an exemplary military record, having received high training scores and been honored with special recognition at graduation ceremonies from a so-called "Leadership School." She has on a number of occasions acknowledged that she is a lesbian. However, there are no allegations that Sergeant benShalom has ever engaged in any prohibited acts of homosexual conduct. The Army has denied Sergeant benShalom reenlistment exclusively on the basis of her acknowledged status as a person of homosexual orientation. Army Reserve Regulations AR

140-111, Table 4-2, makes the status of homosexuality a non-waivable disqualification to reenlistment. Impermissible homosexuality is defined so as to include "an individual who is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service". Rule E, Table 4-2, AR140-111.

The district court's exercise of discretion in the issuance of a preliminary injunction is guided by four factors: 1) whether the movant has an adequate remedy at law such that she will suffer irreparable harm if the preliminary injunction is denied; 2) whether the harm to the movant outweighs the harm to the opposing party if the injunction issues; 3) whether the movant has a reasonable likelihood of success on the merits; and

4) whether the granting of a preliminary injunction will disserve the public interest. Adams v. Attorney Registration and Disciplinary Commission, 801 F.2d 968, 971 (7th Cir. 1986). The application of these four factors has been described as a judicial effort to minimize errors:

> [T]he error of denying an injunction to one who will in fact (though no one can know this for sure) go on to win the case on the merits, and the error of granting an injunction to one who will go on to lose. The judge must try to avoid the error that is more costly in the circumstances."

Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 388 (7th Cir. 1984).

The "likelihood of success on the merits" factor is generally considered a "threshold requirement." Adams, supra, 801 F.2d at 971. Sergeant benShalom has asserted that both her first and fifth amenment rights will be violated if she

is denied reenlistment simply as a result of statements she has made acknowledging her homosexual orientation. In the opinion of this court, Sergeant benShalom has made out a more than colorable claim on both her first and fifth amendment grounds and has thus satisfied this requirement.

The Army argues that the entire complaint is nonjusticiable because "questions concerning the proper composition of the Armed Forces are best left to military professionals." Judges are indeed reluctant to interfere with the military's exercise of discretion in the administration of its personnel matters. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971); Pauls v. Secretary of Air Force, 457 F.2d 294 (1st Cir. 1972). However, a court must not refuse to review a case in which it appears that the military may

have violated the constitutional rights of the plaintiff. benShalom v. Secretary of Army, 489 F. Supp. 964, 971 (E.D. Wis. 1980).

In 1976, Sergenat benShalom was discharged from the Army Reserves because she made statements that she was a lesbian. In 1980 it was held that the Army Reserve regulations which authorized that discharge violated her first amendment rights of free speech and association. benShalom v. Secretary of Army, 489 F. Supp. at 973, 974.

The uncontested factual situation today is very similar to that of 1980. The only real differences are the rewording of the regulations at issue and the fact that Sergeant benShalom is being denied reenlistment instead of being discharged. The defendants contend that the current regulations do not infringe

upon servicemembers' first amendment associational rights, and therefore the 1980 holding is not applicable to this case. However, the fact remains that in 1980 the court ruled that the plaintiff's free speech rights had been violated by her discharge for statements that she had made about her sexual orientation, and today she is being denied reenlistment for those same statements.

As late as August 1987, seven years after the Army was ordered to reinstate the plaintiff, the Army resisted the reinstatement on the grounds that the original regulations under which the plaintiff had been discharged had been reworded. In ordering the Army finally to reinstate the plaintiff, the court of appeals for the seventh circuit stated:

> When benShalom is returned to the Army, the Army is prohibited from discriminating against her because she professes to be

> a lesbian.... A change in the Army regulations, which the Secretary now claims would prohibit benShalom from serving in the Reserves, cannot alter the right of benShalom which was established in Judge Evans' 1980 opinion.

benShalom v. Secretary of Army, 826 F.2d 722, 724 (7th Cir. 1987).

Based on the foregoing, I conclude that the plaintiff has met her burden in establishing a reasonable likelihood of success on the merits of her first amendment claim.

Sergeant benShalom's fifth amendment equal protection claim presents this court with a more novel question of law not yet specifically resolved in this circuit. The issue is whether homosexuals, defined by the status of having a particular sexual orientation and absent any allegations of sexual misconduct, constitute a suspect class. The divergence in case law on this issue is

demonstrated by the contrast in approach between the courts of appeals for the D.C. circuit and the ninth circuit.

In Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987), the court held that homosexuals do not constitute a suspect class in part because it believed that the Supreme Court's decision in Bowes v. Hardwick, 478 U.S. 186 (1986), foreclosed such a result. In Bowes, the Supreme Court upheld as constitutional a Georgia law criminalizing sodomy. The court reasoned that "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause." Padula, supra, 822 F.2d at 103. Thus the court of appeals for the D.C. circuit treated the classification of homosexuality as including

those persons who engage in sodomy and no distinction was drawn between status and conduct.

By contrast, in Watkins v. U.S. Army, 837 F.2d 1428 (9th Cir. 1988), reh. granted ___ F.2d ___ (9th Cir. June 8, 1988), the court decided that the status of homosexuality did constitute a suspect classification. In that case, under facts similar to those in the instant case, the court considered the various factors that the Supreme Court has used to define the characteristics of a suspect class. These included whether the class has suffered a history of purposeful discrimination; whether the class is defined by a trait that bears no relationship to an individual's ability to perform or contribute to society; whether the trait defining the class is immutable; and finally, whether the class

is a discrete group subject to prejudicial majoritarian political power.

In 1980 Judge Evans held that

> "the record is clear that [benShalom's] sexual preferences made no difference to her immediate supervisors or her students. The court is satisfied from the record that her sexual preferences had as much relevance to her military skills as did her gender or the color of her skin."

benShalom, supra, 489 F. Supp. at 974. This finding by Judge Evans and the fact that the plaintiff's exemplary military record has continued to be unaffected by her sexual preference, lead me to conclude that the plaintiff has demonstrated at least a reasonable likelihood of establishing that the mere status (as opposed to actual conduct) of homosexuality is a trait that bears no relationship to an individual's ability to perform or contribute to the military. Similarly, the Army regulations barring reenlistment

to those having the status of homosexuality provide support for the applicability of other indicia of suspectness such as that of purposeful discrimination. Whether or not the plaintiff has a reasonable likelihood of success in establishing homosexuality as a suspect class depends on the viability of the distinction between status and conduct. The Army, taking the Padula approach, would have this court conclude that homosexuals are those "who engage, have engagaed, or likely will engage, in sexual conduct that Congress has criminalized [sodomy]". In that regard, Judge Evans concluded in 1980 that:

> Just as some heterosexuals have, throughout human history, chosen to forego sexual activity for a variety of reasons, it cannot be assumed that all who have personalities oriented toward homosexuality necessarily engage in homosexual conduct.

benShalom, supra, 489 F. Supp. at 975. At this early stage of proceedings, the Army has offered the court no basis to support its implicit fear that Sergeant benShalom (because of her acknowledged status) is likely to engage in criminal sexual conduct; in fact the record today, as in 1980, remains completely devoid of any conduct allegations.

Even if the status-conduct distinction is insufficient to support the establishment of the status of homosexuality as a suspect classification, the plaintiff has demonstrated a reasonable likelihood of success under the more traditional deferential standard. Under this standard the issue is whether the challenged distinction rationally furthers some legitimate, articulated state purpose. McGinnis v. Royster, 410 U.S. 263, 270 (1972). Does an Army

regulation which distinguishes military personnel on the basis of their sexual orientation rationally advance some articulated military purpose? The Army has expressed a number of such purposes: maintenance of discipline, fostering trust among personnel, integrity of the system of rank and command, ease of deployment often under conditions of little privacy, recruitment and retention, maintenance of public acceptability of the Army, and prevention of breaches of security.

While each of these ends is certainly legitimate, the issue is whether any is rationally furthered by the regulation in question. The uncontested facts in this case would seem to indicate that Sergeant benShalom has been an exemplary soldier who has the respect of her peers and superiors. The ends which

the Army purports to protect by denying the plaintiff reenlistment would not seem rationally served by her elimination from the ranks. Unless such a rational relationship can be established it would appear that Sergeant benShalom has a reasonable likelihood of succes on the merits, even under a standard of deferential scrutiny.

As to the remaining factors, the court of appeals for the seventh circuit has held that once the movant has demonstrated the likelihood of success on the merits, "the less heavily need the balance of harms weigh in [her] favor." Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 387 (7th Cir. 1984). The plaintiff has cogently pleaded both tangible and intangible harms if she is discharged without being allowed to reenlist. These include the loss of her

first and firth amendment rights. "The loss of First Amendment freedoms, for even minimal period of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 349, 373 (1975); see also, Oshiven v. Court of Common Pleas, 469 F. Supp. 645, 654 (E.D. Pa. 1979); Jessen v. Village of Lyndon Station, 519 F. Supp. 1183, 1189 (W.D. Wis. 1981); Greater Baltimore Board of Realtors v. Hughes, 596 F. Supp. 906, 924 (D. Md. 1984).

The Army on the other hand asserts that it will suffer irreparable harm if an injunction issues; that an injunction would "seriously undermine the the Army's fundamental authority to determine for itself the proper composition of the armed forces"; that each of the legitimate purposes mentioned above would be adversely affected; in addition, the Army

asserts that the publicity that would accompany an injunction would negatively affect morale and recruitment prospects. These "harms" seem speculative at best and fly in the face of the undisputed facts. There is no allegation that Sergeant benShalom's highly publicized current enlistment term has generated any such harms.

Finally, the public interest is not disserved by the maintenance of the status quo pending the resolution of this case on the merits. Clearly, the plaintiff has carried her burden on each of the four requirements for a preliminary injunction.

Therefore, IT IS ORDERED that the plaintiff's motion for a preliminary injunction pursuant to Rule 65, Federal Rules of Civil Procedure, be and hereby is granted.

IT IS ALSO ORDERED that the defendants be and hereby are directed to consider Sergeant benShalom's reenlistment request without regard to her sexual orientation until further order of the court.

Dated at Milwaukee, Wisconsin, this 2nd day of August, 1988.

/s/ Myron L. Gordon
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MIRIAM BenSHALOM,

Plaintiff,

v. Case No. 88-C-468

JOHN O. MARSH, JR., et al.,

Defendants.

DECISION AND ORDER

On August 19, 1988, the plaintiffs filed a motion seeking a finding of civil contempt, or in the alternative, enforcement of the court's order of August 3, 1988. On August 29, 1988, a hearing was held on the motion. For reasons stated herein, I find the defendants in civil contempt.

The Plaintiff filed an application for a preliminary injunction. Because her enlistment was to expire on August 11, 1988, and because she asserted that she had been informed that she would be

denied reenlistment based on her sexual orientation, a prompt hearing was scheduled. Her motion for a preliminary injunction requested the following:

> Plaintiff, by her attorney, hereby moves the Court pursuant to Rule 65 of the Federal Rules of Civil Procedure, for an Order which requires the Army to consider the Plaintiff's reenlistment application without regard to her sexual orientation until such time as this Court declares Army Reserve Regulation AR 140-111, Table 4-2, constitutional.

This court's written order was dated August 3, 1988; in the mandate, the court granted the plaintiff's motion and directed the defendants "to consider Sergeant benShalom's reenlistment request without regard to her sexual orientation, until further order of the court". The defendants now state that they have 'considered' the plaintiff's reenlistment request without regard to her sexual orientation and that they have determined

that she is otherwise eligible for reenlistment. However, they assert that the court's order does not actually specify that the plaintiff be reenlisted. Therefore, on August 11, 1988, the defendants barred the plaintiff from reenlistment.

The Army contends that it is obliged to follow Army Regulation 140-111, Table 4-2, which bars the reenlistment of homosexuals. The defendants further assert that they have complied with the court's order because they have preserved the status quo by extending the plaintiff's current enlistment period even though they have refused to reenlist her.

I find that the defendants' construction of the order is totally unreasonable. In my opinion, the mandate of the August 3, 1988, order is not ambiguous; the defendants are directed to

consider the plaintiff's reenlistment request without regard to her sexual orientation. "Consideration" of her request, in the context of this case, cannot reasonably be construed to mean anything other than to grant her request if she were otherwise qualified.

On August 11, 1988, General Berzowski wrote to the plaintiff with regard to the courtr's order of August 3, 1988, and stated:

> In compliance with this order, this command has considered your request for reenlistment without consideration of your homosexuality and finds that you otherwise meet the reenlistment criteria contained within Army Regulation 140-111.
>
> This command has considered your request for reenlistment. Army Regulation 140-111, Table 4-2, bars the reenlistment of homosexuals. Therefore, this provision still bars your reenlistment in the United States Army Reserve, and the Army is bound to follow its own lawful regulations.

Since the Army concedes that Ms. benShalom is qualified for reenlistment if her sexual orientation is disregarded, it follows that the preliminary injunction requires that the Army grant her application for reenlistment.

The defendants also argue that this court cannot order the Army to disobey AR 140-111, Table 4-2, without first making a specific finding that the regulation is unconstitutional. Unlike the court's order in Watkins v. U.S. Army, 721 F.2d 687, 690-0691, the court's order in the matter at bar was not based on general equitable powers, but rather upon a determination that all the criteria for a preliminary injunction pursuant to Rule 65, Federal Rules of Civil Procedure, had been satisfied, including a finding that the plaintiff has made out colorable claims that have a reasonable likelihood

of success on the merits under both the first and fifth amendments.

Therefore, IT IS ORDERED that the defendants be and hereby are adjudged to be in contempt of this court's order of August 3, 1988.

IT IS ALSO ORDERED that the defendants shall have through September 12, 1988, either to reenlist the plaintiff or to seek and obtain a stay or reversal of this order from the court of appeals.

IT IS FURTHER ORDERED that if the defendants fail to reenlist the plaintiff on or before September 12, 1988, and a stay or reversal of this order has not been granted by the court of appeals, the defendants shall pay to the Clerk of Court the sum of five hundred dollars ($500.00) per day, commencing September 13, 1988, for each day the defendants fail to reenlist the plaintiff.

IT IS FURTHER ORDERED that said money deposited with the Clerk shall be turned over to the plaintiff weekly.

Dated at Milwaukee, Wisconsin, this 1st day of September, 1988.

/s/ Myron L. Gordon
Senior U.S. District Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 1, 1989.

Before
Hon. HARLINGTON WOOD, JR., Circuit Judge

MIRIAM BEN-SHALOM, Plaintiff-Appellee,	)	Appeals from the U.S. District Court for the Eastern Dist. of Wisconsin
Nos. 88-2771 and 89-1213 vs.	)	
JOHN O. MARSH, JR., Secretary of the U.S. Army, et al., Defendants-Appellants.	)	No. 88-C-468 MYRON L. GORDON, Judge.

This matter comes before the court for its consideration upon the following documents:

1. "MOTION TO STAY THE MANDATE" filed herein on October 18, 1989, by counsel for the plaintiff-appellee.

2. "OPPOSITION TO MOTION TO STAY THE MANDATE" filed herein on October 25, 1989, by counsel for the defendants-appellants.

On consideration thereof,

IT IS ORDERED that the "MOTION TO STAY THE MANDATE" is GRANTED. Issuance

of the mandate in these appeals is stayed to and including December 1, 1989.

JUDGMENT -- ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 7, 1989.

Before
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

MIRIAM BEN-SHALOM, Plaintiff-Appellee,	)	Appeals from the U.S. District Court
Nos. 88-2771 and 89-1213 vs.	)	for the Eastern Dist. of Wisconsin
JOHN O. MARSH, JR., et al., Defendants-Appellants.	)	No. 88 C 468 Judge Myron L. Gordon

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of said District Court in this cause appealed from be, and the same is hereby, REVERSED, the parties shall

bear their respective costs, and the cause is **REMANDED**, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 11, 1989.

Before
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge

Nos. 88-2771 and 89-1213	
MIRIAM BEN-SHALOM, Plaintiff-Appellee,	Appeal from the U.S. District Court
vs.	for the Eastern Dist. of
JOHN O. MARSH, JR., Secretary of the Army, VANCE COLEMAN, Commanding Officer, H.Q. 84th Division, U.S. Army Reserve, and JOHN ALLEN, Lt. Colonel, Commanding Officer, 5091 U.S. Army Reception Battalion, Defendants-Appellants.	Wisconsin No. 88 C 468 Myron L. Gordon, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiff-appellee on August 18, 1989, no judge in active service has requested a vote thereon, and all of the judges on

the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and rehearing *in banc* be, and the same is hereby, DENIED.

The opinion of the Court, issued in the above-entitled cause on August 7, 1989, is amended as follows:

On page 1, footnote 2, insert "American Civil Liberties Union Foundation and" before "American Civil Liberties Union of Wisconsin Foundation, Inc., ..."

Judge Kenneth F. Ripple did not participate in any consideration of the petition for rehearing *in banc* filed in the above cause.

Supreme Court, U.S.
FILED
FEB 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-876

In the Supreme Court of the United States

OCTOBER TERM, 1989

MIRIAM BEN-SHALOM, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Army acted constitutionally when it denied petitioner reenlistment after she admitted that she is a homosexual.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-876

MIRIAM BEN-SHALOM, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A55-A92) is reported at 703 F. Supp. 1372. The opinion of the court of appeals (Pet. App. A1-A54) is reported at 881 F.2d 454.

JURISDICTION

The judgment of the court of appeals (Pet. App. A120-A121) was entered on August 7, 1989. A petition for rehearing was denied on October 11, 1989 (Pet. App. A122-A123). The petition for a writ of certiorari was filed on December 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is currently a Technical Sergeant in the United States Army Reserve stationed in Milwaukee, Wisconsin.

Pet. 3. She has publicly announced that she is homosexual. Pet. App. A1. This protracted litigation concerns petitioner's attempt to continue her service in the Army Reserve despite the Army's regulations barring service by homosexuals.

1. In December 1976, the Army discharged petitioner pursuant to then-existing Army Reg. 135-178, para. 7-5(b)(6), which provided for the discharge of any soldier who "evidences homosexual tendencies, desire, or interest, but is without overt homosexual acts." See *benShalom* v. *Secretary of Army*, 489 F. Supp. 964, 971 (E.D. Wis. 1980). Petitioner filed suit claiming that her discharge violated her constitutional rights to free speech and privacy. The district court held that the then-existing Army regulations were unconstitutionally overbroad under the First Amendment. *benShalom* v. *Secretary of Army*, *supra*. The court ruled that the "broad sweep" of those regulations infringed on the right of soldiers to "meet with homosexuals and discuss current problems," and to "read[ ] anything that might be construed as a homosexually-oriented book or magazine," or to "make any statements that might be interpreted as supporting homosexuality." 489 F. Supp. at 974. The district court also held that the Army's regulation violated petitioner's right to privacy because "constitutional privacy principles clearly protect one's sexual *preferences* in and of themselves from government regulation." 489 F. Supp. at 976. The court ordered that petitioner be reinstated in the Army. 489 F. Supp. at 977.

The government did not appeal from the finding of liability. Instead, the Army revised its regulations regarding homosexuals to address the district court's concern that the regulations were overbroad. The parties, however, continued to litigate the proper remedy for petitioner. That dispute ended with a decision of the court of appeals in *BenShalom* v. *Secretary of Army*, 826 F.2d 722 (7th Cir. 1987),

that required the Army to reinstate petitioner for an 11-month period.

2. Petitioner's enlistment, as extended by the court's order, expired on August 11, 1988. Before that date, petitioner requested reenlistment for a new six-year term of service. Pet. App. A6. In March 1988, petitioner's commanding officer notified her that the Army was considering whether she should be barred from reenlistment under Army Reg. 140-111, Tab. 4-2, Rule E, on the ground that she is homosexual.[1] Under those regulations, which became effective on January 1, 1983, homosexuality is identified as a "nonwaivable moral and administrative disqualification" for reenlistment.

---

[1] Table 4-2, Rule E (Pet. App. A6-A7 n.3) sets forth the following disqualification:

> E. Questionable moral character, history of antisocial behavior, sexual perversion, homosexuality (includes an individual who is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service, or has committed homosexual acts), or having frequent difficulties with law enforcement agencies. (See note 1.)
>
> Notes:
>
> 1. Homosexual acts consist of bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification, or any proposal, solicitation or attempt to perform such an act. Individuals who have been involved in homosexual acts in an apparently [isolated] episode, stemming solely from immaturity, curiosity, or intoxication, and absent other evidence that the individual is a homosexual, normally will not be excluded from service. A homosexual is an individual, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification. *Any official, private, or public profession of homosexuality may be considered in determining whether an individual is an admitted homosexual.* [Emphasis added.]

The Army's March 1988 notice to petitioner informed her that her repeated admissions of homosexuality gave rise to a presumption that she is homosexual, but that she had 30 days to submit a response rebutting that presumption. Pet. App. A8. Petitioner responded by stating: "I am a lesbian." Sep. App. 8;[2] see also Pet. App. A8. After reviewing her statement, the Army concluded that petitioner is an admitted homosexual and thus barred from reenlistment under Army Reg. 140-111, Table 4-2, Rule E. Sep. App. 13. Ben-Shalom was formally notified of that decision on April 7, 1988. Pet. App. A8.

3. Petitioner then filed this action claiming that the Army's refusal to permit her to reenlist violated the First and Fifth Amendments. Pet. App. A8-A9. On August 3, 1988, a few days before petitioner's enlistment was to expire, the district court entered a temporary injunction ordering the Army to consider her reenlistment request without regard to her homosexuality. *Id.* at A112. After the Army found petitioner to be otherwise qualified, it extended her original enlistment pending the conclusion of this litigation.

Petitioner later filed a motion for civil contempt against the Army on the ground that the Army had disobeyed the district court's order. Petitioner argued that the Army was required to grant her a new enlistment contract, not merely extend her original enlistment period. The district court agreed with petitioner and entered a finding of contempt against the Army. Pet. App. A111-A117. The district court also imposed a fine of $500 per day against the Army, but delayed imposition of the fine to allow the Army to seek a stay from the court of appeals. *Id.* at A116. Rather than seek a stay, the Army complied with the district court's order. Under the terms of the reenlistment, petitioner's new

---

[2] 'Sep. App." refers to the Separate Appendix filed in the court of appeals in appeal No. 88-2771.

enlistment contract will be considered void if the district court's order is reversed.

On January 10, 1989, the district court entered its final order holding the Army's regulations to be unconstitutional under both the First and Fifth Amendments. Pet. App. A55-A92. The district court held that the Army's reliance on petitioner's admission of homosexuality, without evidence of her having engaged in homosexual acts, violated her free-speech rights protected by the First Amendment. Pet. App. A76. The court also held that the Army's exclusion of homosexuals, without evidence of homosexual acts, violated the equal-protection component of the Fifth Amendment. The court reasoned that the Army's treatment of persons based on their "sexual orientation" constitutes a suspect classification, which is subject to strict scrutiny. *Id.* at A87. The court held, however, that even if strict scrutiny did not apply, the regulation excluding homosexuals (without evidence of homosexual conduct) was not rationally related to any legitimate governmental interest. *Id.* at A88-A91.

4. The court of appeals reversed the district court's judgment. Pet. App. A1-A54. The court rejected petitioner's First Amendment challenge to the Army's regulations. The court determined that, under the new regulations, petitioner "is free * * * to say anything she pleases about homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes." Pet. App. A32. The court reasoned that it is her "identity" as a homosexual that makes her ineligible for military service, "not the speaking of it aloud." *Ibid.* Moreover, relying on this Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968), the court of appeals held that, even if the regulation "affects speech, it does so only incidentally, in the course of pursuing other legitimate goals." Pet. App. A32.

The court of appeals also rejected petitioner's equal-protection argument. The court held that the "deferential" rationality standard of review is applicable, and that "the Army satisfies that standard without any difficulty." Pet. App. A44. The court of appeals disagreed with petitioner's claim that strict scrutiny was required because the Army's regulation is based on status instead of conduct. The court of appeals noted that this case is not about status; rather, petitioner's repeated admissions of her homosexuality are "compelling evidence that [she] has in the past and is likely to again engage in [homosexual] conduct." *Id.* at A42.

Applying the rationality test, the court concluded that "[t]he new regulation * * * clearly promotes a legitimate government interest sufficient to survive rational basis scrutiny." Pet. App. A49. Because this case involves the composition of the armed forces, the court ruled that the military's judgment is entitled to deference and that the classification created by the regulation is "supported by military considerations and should be left to the Army." *Ibid.* Accordingly, the court concluded that it was "unwilling to substitute a mere judge-made rule for the Army's regulation or to act in an executive or legislative fashion." *Id.* at A51.

ARGUMENT

The decision of the court of appeals is correct and it does not conflict with any decision of this Court or of any other court of appeals. Thus, no further review is warranted.

1. The courts of appeals have consistently upheld military regulations barring service by homosexuals. See *Woodward* v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), petition for cert. pending, No. 89-344; *Dronenburg* v. *Zech*, 741 F.2d 1388 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Beller* v. *Midden-*

dorf, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). The only appellate decision invalidating the military regulations, *Watkins* v. *United States Army*, 837 F.2d 1428 (9th Cir. 1988), was vacated by the en banc court of appeals, and the case was decided on other grounds. *Watkins* v. *United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc). Despite this great weight of contrary authority, petitioner challenges the court of appeals' decision on three grounds. There is no merit to any of those arguments.

2. Petitioner first contends (Pet. 12-21) that there was no rational basis for the Army to deny reenlistment to her simply because she is homosexual. That argument is premised (Pet. 14) on her observation that, although she admits that she is homosexual, the Army has no evidence that she has engaged in homosexual conduct. The court of appeals, in accordance with the Federal Circuit's decision in *Woodward* v. *United States*, *supra*, properly rejected that argument.

As the court of appeals noted (Pet. A42-A43), the Army's regulation "does not classify [petitioner] based merely upon her status as a lesbian, but upon reasonable inferences about her probable conduct in the past and in the future." The reasonableness of such an inference of homosexual conduct is apparent. Petitioner has repeatedly admitted that she is a homosexual. See, *e.g.*, Sep. App. 6, 8. She does not deny that she has engaged in or will engage in homosexual conduct. Pet. App. A43. Her admissions of her homosexuality, "if not an admission of its practice, at least can rationally and reasonably be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct." *Id.* at A42. Accordingly, the court of appeals properly recognized that her admissions constitute "compelling evidence that [she] has in the past and is likely to again engage in [homosexual] conduct." *Ibid.* The Army "need not shut its eyes to the practical realities of this situation, nor be com-

pelled to engage in the sleuthing of soldiers' personal relationships for evidence of homosexual conduct in order to enforce its ban on homosexual acts." *Id.* at A43.

Nevertheless, petitioner argues (Pet. 18-19) that it is irrational for the Army to bar homosexuals because heterosexuals can also engage in certain sexual acts that are made criminal by Article 125 of the Uniform Code of Military Justice, 10 U.S.C. 925. The Army, however, has determined that homosexual conduct is a greater problem in the military than is heterosexual conduct. Eight years ago, the Department of Defense issued a directive stating that, in its view, the presence of homosexuals in the military will

> adversely affect[ ] the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

Department of Defense Directive (DOD) No. 1332.14, at 1-9 to 1-10 (Jan. 28, 1982). Thus, since the Army's concern is with the potentially disruptive effect of homosexual conduct, it is obviously rational to exclude homosexuals while allowing heterosexuals to serve. Cf. *Hatheway* v. *Secretary of the Army*, 641 F.2d 1376 (9th Cir.) (Army may prosecute homosexual sodomy even though it chooses not to prosecute heterosexual sodomy), cert. denied, 454 U.S. 864 (1981).

Petitioner's main point (Pet. 15-21) seems to be that there is no empirical basis for the Army's concern about homosexuals. Petitioner refers to the draft report of the Defense Personnel Security Research and Education Center (Perserec) (Dec. 1988) in support of her view that homosexuality

does not affect a soldier's ability to perform his or her job. The existence of that draft report, however, suggests at most that the Army's regulation is subject to reasonable debate; it does not show that the Army's policy is irrational. Indeed, the Perserec report itself recognizes that, although individual homosexuals may be good soldiers, there are important institutional factors that warrant further study (Perserec Report at 33):

> For the purpose of military organization * * * [the] quality of job performance may be less important than the effects of homosexuals * * * on that important but ephemeral quality: group cohesion. The important question to be raised in future research must center on the claims that persons with nonconforming sexual attitudes create insurmountable problems in the maintenance of discipline, group cohesion, morale, organizational pride, and integrity.

Thus, the draft report simply called for "engaging in empirical research to test the hypothesis that men and women of atypical sexual orientation can function appropriately in military units." Perserec Report at iii.

Furthermore, contrary to petitioner's suggestion (Pet. 15), the Army was not required to justify its regulation by submitting empirical data to the courts. That is clear from this Court's decision in *Goldman* v. *Weinberger*, 475 U.S. 503, 509 (1986), where the Court rejected the contention that the Army was required to submit empirical evidence to support the need for its dress regulations in a case where a serviceman claimed that those regulations violated his First Amendment rights. *Ibid.* The Court declared: "The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment." *Ibid.* The *Goldman* decision follows the long line of cases

holding that determinations regarding the composition and discipline of the military forces are better left to professional military judgments, subject to civilian control of the Legislative and Executive Branches. See *e.g.*, *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); *Rostker* v. *Goldberg*, 453 U.S. 57 (1981); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975). Not only are courts "ill-equipped" to make judgments about such military matters, *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983), but our constitutional system places the responsibility for such decisions elsewhere. As the Court noted in *Ballard*, 419 U.S. at 510:

> This Court has recognized that "it is the primary business of armies and navies to fight or be ready to fight wars should this occasion arise." *Toth* v. *Quarles*, 350 U.S. 11, 17. See also *Orloff* v. *Willoughby*, 345 U.S. 83, 94. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, see U.S. Const., Art. I, § 8, cls. 12-14, and with the President. See U.S. Const., Art. II, § 2, cl. 1. * * *

See also *United States* v. *MacIntosh*, 283 U.S. 605, 622 (1931) (Congress has the authority to say "who shall serve * * * and in what way" in the military). The court of appeals, therefore, acted in accord with these principles when it determined that the Army's decision to exclude homosexuals was well within the professional discretion granted to military authorities.

3. Petitioner next contends (Pet. 24-30) that homosexuals are a "suspect class[ ]" for equal-protection purposes and, therefore, the court of appeals should have reviewed the Army's regulation under the strict-scrutiny standard. That argument is difficult to reconcile with *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), in which this Court held that "the Federal Constitution [does not] confer[ ] a fundamental

right upon homosexuals to engage in sodomy." 478 U.S. at 190. If, as *Bowers* holds, the government may make homosexual acts a crime, it is implausible to say that those with a proclivity to commit such acts constitute a group that deserves special protection from the courts under the Equal Protection Clause.[3] Thus the court of appeals below properly joined the District of Columbia Circuit, *Padula* v. *Webster*, 822 F.2d 97, 103 (1987), and the Federal Circuit, *Woodward* v. *United States*, 871 F.2d at 1076, in rejecting the argument that the strict-scrutiny standard should apply to regulations that single out homosexuals for differntial treatment. [4] There is no conflict among the appellate courts over that issue.[5]

4. Finally, petitioner's claim (Pet. 21-24) that the Army's regulations violate her free-speech rights is without merit. As the court of appeals recognized (Pet. App. A31-A32), the Army's regulations implicate free speech only to the extent that an admission may be used to identify those who are homosexuals and thus ineligible for military service. Under the regulation, "Ben-Shalom is free * * * to say

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[3] As the Federal Circuit stated in *Woodward*, 871 F.2d at 1076:

> After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm. We agree with the court in *Padula* v. *Webster* that "there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." 822 F.2d 97, 103 (D.C. Cir. 1987).

[4] Even prior to *Hardwick*, the courts of appeals had consistently refused to accord strict scrutiny to review of decisions adversely affecting homosexuals. See *Baker* v. *Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986); *Dronenburg* v. *Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984); *Beller* v. *Middendorf*, 632 F.2d 788, 807-810 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

[5] Petitioner cites (Pet. 24, 29) the panel opinion in *Watkins*, but as we noted above, that opinion was vacated by the en banc court and the case was decided on other grounds.

anything she pleases *about* homosexuality and about the Army's policy toward homosexuality. She is free to advocate that the Army change its stance; she is free to know and talk to homosexuals if she wishes." *Id.* at A32 (emphasis added). It is the "identity" of petitioner as a homosexual that makes her ineligible for military service. *Ibid.*

It is clear that admissions may be used to exclude many classes of persons from the military (*e.g.*, minors or felons) without violating the First Amendment. Just as the First Amendment would not operate as a sort of "exclusionary rule" precluding the use of admissions establishing those facts, it also cannot be used to preclude the use of an admission of homosexuality. See *Johnson* v. *Orr*, 617 F. Supp. 170, 175 (E.D. Cal. 1985), aff'd mem., 787 F.2d 597 (9th Cir. 1986) (Table). As the court of appeals observed, petitioner's unqualified admission of homosexuality shows a propensity to engage in homosexual *conduct*, and "[i]n determining the composition of the armed forces, the Army does not have to take the risk that an admitted homosexual will not *commit homosexual acts* which may be detrimental to its assigned mission." Pet. App. A25-A26 (emphasis added).

In any event, the court of appeals correctly noted (Pet. App. A28-A32) that any incidental chilling effect on speech caused by the regulation does not rise to the level of a constitutional violation. Review of military regulations challenged on First Amendment grounds is "far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986). See also *Greer* v. *Spock*, 424 U.S. 828 (1976) (upholding Army base's regulations banning speakers and demonstrations of a partisan political nature). There is no indication that the use of admissions of homosexuality has any substantial effect on the exercise of a soldier's right to speak freely. It simply is a legitimate way of iden-

tifying those persons who are ineligible for military service because of their homosexuality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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